SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 560

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS AND MANUFACTURERS ASSOCIATION, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.

No. 561

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, (RALEIGH DIVISION)

No. 189 Civil

STATE OF NORTH CAROLINA, and NORTH CAROLINA UTILITIES COMMISSION, Petitioners,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed June 5, 1944

To constitute a 3-judge court, to stay, temporarily enjoin, permanently enjoin and set aside an Order of the Interstate Commerce Commission.

To the Honorable Judges of the District Court of the United States in and for the Eastern District of North Carolina, (Raleigh Division)

Petitioners

#100. The State of North Carolina, by Harry McMullan, its Attorney General, and Stanley Winborne, Fred C. Hunter and Robert Grady Johnson, as and constituting North Carolina Utilities Commission, hereinafter referred to as North Carolina, bring this their petition against the United States of America and the Interstate Commerce Commission, and thereupon respectfully show that:

The North Carolina Utilities Commission

#101. The petitioners, Stanley Winborne, Fred C. Hunter and Robert Grady Johnson, are the duly appointed, qualified and acting Utilities Commissioners of the State of North Carolina; and as, and constituting, such North Carolina Utilities Commission they are, under the constitution and laws of the State of North Carolina, charged with the duty and authority of supervising, regulating and enforcing rates and charges for transportation service performed by railroads as common carriers in intrastate commerce in

the State of North Carolina, and are authorized and empowered to bring and maintain this proceeding; and, as such, they have their principal offices in Raleigh, N. C.

[fol. 5] *Defendants*

#102. The United States of America is made defendant herein by virtue of those certain acts of Congress known as the District Court Jurisdiction Act, 38 Stat. L. 219, U. S. C. Title 28, Section 28; Judicial Code Section 211. The defendant Interstate Commerce Commission is an administrative tribunal created by Act of Congress, February 4, 1887, and whose duties and powers are defined in the Interstate Commerce Act, Part I, 24 Stat. L. 379, as amended; U. S. C. Title 49, Sections 1-27.

To Set Aside an Order of the Interstate Commerce Commission

#103. Petitioners herein respectfully institute this proceeding for the purpose of annulling, vacating, and setting aside a report dated March 25, 1944, and an Order dated May 8, 1944, of said Interstate Commerce Commission, in a proceeding before that Commission, entitled North Carolina Intrastate Coach Fares, under I. C. C. Docket No. 29036, affecting intrastate coach fares in North Carolina, and to enjoin the enforcement thereof. Said proceeding was consolidated by the Interstate Commerce Commission, for oral argument, Report and Order with No. 28963, *Alabama Intrastate Fares;* No. 29060, *Kentucky Intrastate Fares;* and No. 29037, *Tennessee Intrastate Fares.*

Jurisdiction

#104. The action arises under the District Court, Jurisdiction Act, 38 Stat. 219, 220; U. S. C. (1940 edition), Title 28:

Section 41(28), 54 Stat. 143—Setting aside order of Interstate Commerce Commission;
Section 43—Venue;
Sections 44, 45, 45a, 46—Procedure;
Sections 47—Injunctions;
Section 48—Suits to be against United States;
Section 792—Powers of a single judge. (U. S. C. Supl. II, April 6, 1942)
all as hereinafter more fully appears.

The Railroads

#105. The said proceeding, No. 29036, before the Interstate Commerce Commission arose on petition of eleven common carrier railroads which are engaged in the transportation of passengers in intrastate commerce within the State of North Carolina, viz:

[fol. 6] Aberdeen and Rockfish Railroad Company
Atlantic and East Carolina Railway Company
Atlantic Coast Line Railroad Company
Carolina and Northwestern Railway Company
Carolina, Clinchfield and Ohio Railway
Danville and Western Railway Company
Louisville and Nashville Railroad Company
Norfolk Southern Railway Company
Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers)
Southern Railway Company
Winston-Salem Southbound Railway Company

hereinafter referred to collectively as the Railroads, or by their respective initials, or abbreviations of their names. The Railroads are the parties which are required by the said Order of May 8, 1944, of the Interstate Commerce Commission to publish, maintain and apply, effective July 1, 1944, certain passenger fares for intrastate travel in coaches within the State of North Carolina.

#105.1. The principal office of the A. & R. R. R. Co. is in Aberdeen, N. C.; of the A. & E. C. Ry. Co. is in Kinston, N. C.; of the A. C. L. R. R. Co. is in Wilmington, N. C.; of the W.-S. S. Ry. Co. is in Winston-Salem, N. C., and Wilmington, N. C., and each of said railroads has its residence in the Eastern District of North Carolina, and some of them, including the S. A. L. Ry. Co. are incorporated in North Carolina, all of which will appear from the reports duly filed by said carriers with the North Carolina Utilities Commission. (U. S. C., Title 28, Section 43—Venue)

Transcript of Record, Etc.

#106. Accompanying this Petition is a copy of the following material records in the said proceedings before the Interstate Commerce Commission, duly certified to by the Secretary of the Interstate Commerce Commission accord-

ing to law (U. S. C., Title 49, Section 16(13)), which records are made a part of this Petition by reference and are hereinafter referred to collectively as the Record and respectively by the names of the documents comprising such Record, to wit:

#107. The Railroads' Petition (to the I. C. C., dated July 22, 1943).

#108. The Commission's Order of Investigation (in No. 29036, October 13, 1943).

#109. Transcript of Hearing (tr.).

#110. Exhibits 1 to 20 (in No. 29036).

#111. Railroads' Brief (February 16, 1944).

#112. North Carolina's Brief (February 16, 1944).

[fol. 7] #113. Oral Argument (transcript in 28963, 29000, 29036 and 29037).

#114. The Commission's Report, or The Report (March 25, 1944).

#115. North Carolina's Petition for Further Hearing (etc., April 29, 1944).

#116. Price Administrator's Petition for Reconsideration (etc.).

#117. Railroads' Motion for Order.

#118. The Commission's Order, or The Order (May 8, 1944). As corrected May 24, 1944.

#119. The Commission's Order of May 8, 1944, Denying the Petitions for Reconsideration (etc.).

All of which certified copies of such Records in I. C. C. Docket No. 29036 are tendered as prima facie evidence of what they purport to be for the purpose of this judicial proceeding.

History of the One-Way Coach Fares in the South

#120. On February 28, 1936, the Interstate Commerce Commission approved an interstate coach fare of 1.5 cents as not unreasonable or otherwise unlawful, in *Passenger Fares and Surcharges*, 214 I. C. C. 174. A like fare for

intrastate coach travel in North Carolina was authorized by the North Carolina Utilities Commission.

#121. On February 10, 1942, the Interstate Commerce Commission permitted a 10% increase in the interstate fare of 1.5 cents to 1.65 cents in *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545. A corresponding increase in the North Carolina intrastate coach fares was authorized on February 5, 1942, by the North Carolina Utilities Commission.

#122. On August 1, 1942, the Interstate Commerce Commission authorized an increase in the interstate one-way coach fares from 1.65 cents to 2.2 cents, in *increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545.

#123. On October 12, 1942, the Railroads petitioned the North Carolina Utilities Commission for authority to increase their fares for intrastate one-way transportation in coaches between all stations in North Carolina from 1.65 cents per mile to 2.2 cents per mile and to make certain other changes in round-trip fares and time-limits for return trips.

#124. On July 8, 1943, the North Carolina Utilities Commission, under its Docket No. 2789, issued its report and interlocutory order, authorizing the proposed changes in fares for transportation in sleeping or parlor cars but de-
[fol. 8] clined to authorize the proposed increase in coach fares stating that it would defer action on this phase of the petition pending the filing of a petition by the North Carolina Utilities Commission with the Interstate Commerce Commission seeking an investigation of the interstate coach fares to and from the State of North Carolina. (See Appendix 2 to Railroads' Petition to the I. C. C., #107.)

#125. In its report of July 8, 1943, the North Carolina Utilities Commission found that the evidence "indicates a very probable need for additional revenue from coach fares by two of the carriers, viz., Carolina Clinchfield and Ohio Railway Company and the Norfolk Southern Railway Company" which had incurred deficits from passenger operations for the year 1942. (See Appendix 2 to Railroads' Petition, #107.); but in that proceeding counsel for the Railroads frankly made it plain that the Railroads did not

"consider this strictly a revenue case." (Tr. 173 in I. C. C. No. 29036, #109.)

The Railroads' Petition to the Interstate Commerce Commission

#126. On July 22, 1943, the Railroads filed their petition with the Interstate Commerce Commission (#107.) alleging that the refusal of the North Carolina Utilities Commission to permit the increases in intrastate coach fares to correspond to those established for interstate travel on October 1, 1942, causes undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and undue, unreasonable, and unjust discrimination against interstate commerce in violation of the Interstate Commerce Act, Part I, Section 13(3) and (4), U. S. C. Title 49 Section 13. 41 Stat. L. 484.

The Commission's Order Instituting this Investigation

#127. On October 13, 1943, the Interstate Commerce Commission, in response to the Railroads' petition, entered its Order (#108.) instituting its investigation, No. 29036, entitled *North Carolina Intrastate Coach Fares,* to determine whether the alleged refusal of the North Carolina Utilities Commission to authorize or permit the application to the transportation of passengers traveling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on [fol. 9] October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust *id*scrimination against interstate or foreign commerce: and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges shall be prescribed to remove such unlawful advantage, preference, prejudice, or discrimination, if any, as may be found to exist.

#128. On this same day, October 13, 1943, the Interstate Commerce Commission advised the North Carolina Utilities Commission by letter that its petition to investigate the interstate fares had been denied on October 11, 1943.

The Hearing

#129. On December 28 and 29, 1943, a hearing was held before Examiner John P. McGrath, an Examiner of the Interstate Commerce Commission, in I. C. C. No. 29036, *North Carolina Intrastate Coach Fares*, at Raleigh, N. C. (Transcript of Hearing #109, and Exhibits #110.)

Briefs

#130. At the close of the hearing the Examiner assigned a date for filing briefs and announced that no Proposed Report would be issued, and Opening Briefs were filed by all parties. (Railroads' Brief #111., and North Carolina's Brief #122.)

#131. North Carolina's request at the hearing that a date be assigned for the filing of Reply Briefs was refused by the Examiner, (tr. 242-243) although Reply Briefs are permitted in such cases by the Interstate Commerce Commission's Rules of Practice, Rule 93.

Oral Argument

#132. On February 18, 1944, the *North Carolina Case*, No. 29036, was argued orally upon a consolidated record with the *Alabama Case*, No. 28963, the *Kentucky Case*, No. 29000, and the *Tennessee Case*, No. 29037, before the Interstate Commerce Commission. (Oral Argument #113.)

The Consolidated Report of the Commission

#133. The Report of the Interstate Commerce Commission, containing its findings of fact and conclusions in the four consolidated cases, 28963, 29000, 29036 and 29037, decided March 25, 1944, was served subsequent to that date. (The Commission's Report #114.)

[fol. 10] *Summary of the Six Primary Conclusions in the Commission's Report*

The primary findings or conclusions of the Interstate Commerce Commission in The Report (114.) are that:

#133.1. The interstate coach fares are just and reasonable.

#133.2. The intrastate coach fares are lower than the interstate fares, with some exceptions.

#133.3. The conditions affecting travel in coaches in interstate and intrastate commerce are substantially similar.

#133.4. Interstate passengers are forced to pay higher fares than intrastate passengers for like services to the undue and unreasonable disadvantage and prejudice of the interstate passengers.

#133.5. The Railroads' revenues are at least $525,000 per annum lower in North Carolina than if the intrastate fares were increased to the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenue required to enable the railroads to render adequate and efficient transportation service.

#133.6. The maintenance of one-way and round-trip coach fares in North Carolina on a lower level than the corresponding interstate fares causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce. The unlawfulness should be removed by increasing the intrastate fares to the level of the corresponding interstate fares contemporaneously maintained by the Railroads to, from and through the state.

#134. The Six Conclusions were made without prejudice to the right of the authorities of the affected states, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act.

#135. The Commission left to the Railroads and the respective State Commissions the matter of adjusting the intrastate fares to conform to the findings, and said that if this is not accomplished within thirty days from the service of the Report, consideration would be given to the entry of an appropriate order. (#114.)

[fol. 11] *The dissents*

#136. Commissioner Splown dissented on the ground that the majority decision goes beyond the Commission's

lawful power under Section 13(4) of the Interstate Commerce Act. Commissioners Aitchison and Mahaffie joined in his dissent. (#114.)

North Carolina's Request for Additional Data

#137. On or about April 8, 1944, the North Carolina Utilities Commission requested that the Railroads furnish certain statistical data for the calendar year 1943, such as passenger revenue, passenger car-miles and passenger miles, in deluxe, reserved seat passenger service; and the Railroads declined to furnish such data on the ground that it is not available and could not be compiled at this time.

North Carolina's Petition for Further Hearing

#138. On or about April 26, 1944, the North Carolina Utilities Commission filed with the Interstate Commerce Commission under I. C. C. Docket No. 29036, a petition for extension of the 30-day period within which to adjust certain intrastate fares; for further hearing to receive supplemental statistical evidence; and for modification of certain findings in the Interstate Commerce Commission's Report of March 25, 1944; and for reargument; and for reconsideration, on behalf of the North Carolina Utilities Commission, Charlotte Shippers & Manufacturers Association, Inc., and North Carolina Division of the Travelers Protective Association of America, as joint complainants and protestants in I. C. C. Docket No. 29036. (#115.)

#139. The said petition of the North Carolina Commission sets forth with particularity numerous specifications of errors of fact; of erroneous findings; of erroneous omission of certain specific findings which had been requested by the North Carolina Utilities Commission and other joint Protestants; of erroneous conclusions of fact; of erroneous conclusions of law; of erroneous rejection of evidence at the hearing; and of the arbitrary failure of the Interstate Commerce Commission to consider certain presumptions of law founded upon facts of record; all in support of its prayers for further hearing to receive further evidence, for oral argument; and for reconsideration; as set forth in North Carolina's Petition (#115.), which is made a part hereof by reference as though the same were set forth herein in haec verbae.

[fol. 12] *The Commission's Order*

#140. On May 8, 1944, the Interstate Commerce Commission entered its Order as corrected May 24th, 1944, in I. C. C. Docket Nos. 28963, 29000, 29036 and 29037, in which the Railroads are notified and required to cease and desist on or before July 1, 1944, and thereafter to abstain, from practicing the undue prejudice and preference and the unjust discrimination found in said report to exist; and notifying and requiring the Railroads to establish, on or before July 1, 1944, upon not less than thirty days' notice, and thereafter to maintain and apply, passenger fares for intrastate transportation in the respective states which shall be on bases no lower than the passenger fares presently maintained and applied by the respective carriers for like accommodations in interstate transportation to, from, and through the respective States; provided, that the resulting aggregate charge made by any of said Railroads for intrastate transportation in any of the states shall not exceed the aggregate charge made for like accommodations and for a like distance by the same Railroad for interstate transportation to, from or through such state. (#118.)

The North Carolina Utilities Commission's Order Granting the Increase in Fares to Weak Lines

#141. On or about May 16, 1944, the North Carolina Utilities Commission, upon receipt of further evidence in the proceeding before it under its Docket 2789, finding that the passenger operating expenses of the Carolina, Clinchfield and Ohio Railway and the Norfolk Southern Railway Company for the years 1942 and 1943 exceeded their respective passenger revenues for the two respective years, issued its Supplemental Order granting the application of those two Railroads, the C. C. & O. Railway and the N. & S. Ry., for increases in their intrastate civilian coach fares; and finding that there is no evidence as to other short lines, and leaving the original order interlocutory in form as to the A. C. L., L. & N., S. A. L. and Southern Railways.

#141.1. A true copy of said Supplemental Report and Order of the North Carolina Utilities Commission, dated May 16, 1944, is attached hereto, and marked Appendix 141.1, and by reference made a part hereof.

#142. Wherefore, it is now alleged that the State of North Carolina and the North Carolina Utilities Commission have exhausted their administrative remedies before the Interstate Commerce Commission before instituting this proceeding for the purpose of staying, temporarily enjoining, permanently enjoining, and annulling, vacating and setting aside said Report of the Interstate Commerce [fol. 13] Commission of March 25, 1944, (#114.) and Order of May 8, 1944, (#118.) and for such other relief as may be herein requested and as may be proper in the premises.

Grounds of Invalidity of the Commission's Report and Order

#143. Your Petitioners aver that said Report (#114.) and Order (#118.), here challenged, violate the provisions of the Federal Constitution, particularly the Tenth Amendment thereto; exceed the power delegated to the Interstate Commerce Commission by the Statute and constitute an exercise of power in itself, and in the manner of its exercise, so a-bitrary as virtually to transcend the authority conferred on said Commission for the following said reasons, among others:

Exhaustion of Remedies

#144. The Interstate Commerce Commission erred in proceeding in said cause No. 29036, and in making its said Report (#114.) and entering its Order (#118.) before the respondent carriers therein had exhausted their remedies before the North Carolina Utilities Commission in the proceeding initiated by the said carriers in and before the North Carolina Commission, in which proceeding the Interlocutory Order of the North Carolina Utilities Commission still leaves the door open to the Railroads with the exception of The Carolina, Clinchfield and Ohio Railroad and the Norfolk Southern Railway, as to which their application to the North Carolina Utilities Commission has been granted by the North Carolina Utilities Commission's Supplemental Order. (Appendix 141.1)

Full Hearing Denied

#145. The Interstate Commerce Commission erred in denying to North Carolina the full hearing to which it and

other parties joined therewith were and are entitled under the provisions of Sections 13(1), 13(2), and 15(1) of the Interstate Commerce Act (U. S. C., Title 49), in the following particulars, among others:

#145.1. In that the Interstate Commerce Commission refused to investigate the reasonableness of the interstate coach fares of the Railroads under the changed conditions, upon the Petition and Complaint of the North Carolina Utilities Commission, the Alabama Public Service Commission, and the Office of Price Administration, all of which Petitions were filed before the proceeding in I. C. C. No. 29036 was instituted.

[fol. 14] #145.2. In that the Interstate Commerce Commission's Examiner, at the Hearing (#109.), ruled that the question as to the reasonableness of the interstate coach fares is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares; that that was his understanding; and that otherwise it is not in issue; and that it is not subject to attack, and that the parties are at liberty to show what facts they have and their position on that particular question (#109., tr. 15), thereby precluding the production of any evidence by North Carolina as to that issue.

#145.3. In that said Examiner overruled at the Hearing (#109.) and denied North Carolina's request for opportunity to file Reply Briefs (#109., tr. 243), even though in such cases where no proposed report was to be issued, the filing of Reply Brief is permitted by Rule 93 of the Commission's Rules of Practice.

#145.4. In that said Commission denied North Carolina's Petition for Further Hearing, etc. (#115.)

The Reasonableness of the Interstate Fares

#146. The Interstate Commerce Commission erred as a matter of law in making the finding that the interstate coach fares are just and reasonable in that the Commission had denied the Petition of the North Carolina Commission, the Alabama Commission and the Price Administrator seeking an investigation into the reasonableness of such interstate coach fares; and in that the Examiner at the hearing ruled that the interstate coach fares were not in issue.

#147. The said Commission erred as a matter of law in failing and refusing to find, as specifically requested by North Carolina at pages 6 to 12 of its Brief (#112.), that the coach fare of 1.5 cents per passenger per mile, prior to the 10% increase, having been found not unreasonable or otherwise unlawful by the said Interstate Commerce Commission in *Passenger Fares and Surcharges*, 214 I. C. C. 174 in 1936, and the said fare of 1.5 cents having benefited the Railroads by increasing the amount of travel in passenger coaches over their respective lines of railroad during times of economic depression, the burden of proof rested heavily upon the Railroads to justify their petition to the Interstate Commerce Commission for authority to increase [fol. 15] their intrastate coach fares from 1.65 cents to 2.2 cents, during times of war prosperity for the Railroads. (#115.)

#148. The said Commission erred as a matter of law in basing its finding as to the reasonableness of the interstate fare of 2.2 cents and its finding that the intrastate fare of 1.65 cents was subnormal solely upon a mere comparison of the one interstate fare, which the said Commission had authorized, under pre-war conditions, with the intrastate fare, which the said Commission also approved as not unreasonable under pre-war conditions; and thes aid Commission erred in not heeding the principle of law which was enunciated in *Florida v. United States*, 282 U. S. 194, 212, and which was invoked by North Carolina in its Brief at page 30, and in its Petition for Reconsideration at pages 15 to 18, that a showing of the mere difference between particular rates on interstate and intrastate traffic is not sufficient.

#149. The said Commission erred as a matter of law in arriving at its findings that the interstate coach fare is just and reasonable and that the intrastate coach fare is subnormal in taking into consideration the evidence and its findings with respect to the unusually high expenses incurred by the Railroads in the movement of troop trains, compensation for which is not regulated by the North Carolina Commission, and the added costs of which cannot lawfully be charged or added in determining the reasonableness of fares for civilian travel in coaches. (#115.)

#150. The said Commission erred as a matter of law in basing its findings as to the reasonableness of the intrastate

fares upon the fact that the Railroads have expended large sums of money in providing air-conditioned deluxe coaches, and Diesel locomotives for streamlined trains, whereas the uncontradicted evidence shows that the North Carolina intrastate coach travelers are practically excluded from the use of the expensive, deluxe, comfortable, reserved seat coaches on fast streamlined trains; and the Commission's action was arbitrary in failing and refusing to find, as requested by North Carolina, that no part of the added expense of, or the investment in, the deluxe coaches on streamlined trains is chargeable to North Carolina's intrastate travelers who must ride in over-crowded and antiquated non-reserved seat coaches.

[fol. 16] #151. The said Commission erred as a matter of law in finding and considering the finding that *all* trains in each of the States are available to and are used by both interstate and intrastate passengers, which finding is without evidence to support it, and which finding is contrary to undisputed evidence that there are restrictions against the use of deluxe, streamlined, reserved seat coaches and trains by North Carolina intrastate travelers so that almost no intrastate travelers in North Carolina can use such trains. (#115.)

#152. The said Commission made no finding that said intrastate fare is non-compensatory, which finding is an essential prerequisite to the making of a valid order of the character herein attempted to be made by the Commission, and which finding cannot be made upon evidence that was before it.

#153. The said Commission erred as a matter of law in making the finding that the North Carolina intrastate coach fare of 1.65 cents should be increased to the interstate fare of 2.2 cents, in that there was no evidence before it which would justify such finding, and the Commission made no finding, and there was no evidence, that the intrastate fare of 1.65 cents is unreasonably low to the extent that it is less than the interstate fare of 2.2 cents.

#154. The said Commission's action was arbitrary in failing to find and failing to take into consideration, as requested by North Carolina, the fact that the intrastate fare of 1.65 cents had been specifically approved by it during time of nationwide depression as being not unreasonable or

otherwise unlawful, and that the burden of proof was upon the carriers to justify a proposed increase under changed conditions during war times of increased travel and traffic and greatly increased net revenues from railway operations.

#155. The said Commission's action was arbitrary in failing to take into consideration and failing to find, as specifically requested by North Carolina, that, the burden being upon the Railroads, their failure to show the relation of their proposed intrastate fares per passenger mile in coaches to their expenses per passenger mile in coaches is evidence of the strongest character against them; and that under existing conditions such intrastate fares are unreasonably high in comparison with their expenses per passenger mile [fol. 17] in coaches. (#112. and #115.)

#156. The said Commission's action was arbitrary in denying North Carolina's Petition for Further Hearing to produce evidence, which was before the said Commission, that the number of passengers has increased much more greatly in non-reserved seat coaches than in deluxe reserved seat coaches and parlor and sleeping cars during the war years, and that the existing intrastate coach fares yield more than the expenses including fair return on value; in proof whereof North Carolina hereby tenders the affidavit of Frank A. Downing, Rate Specialist for the North Carolina Utilities Commission, which is attached hereto and marked Appendix 156.1 and made a part hereof by reference, which shows the average expenses of the A. C. L., L. & N., S. A. L., and Southern per coach passenger were 0.97 cent per mile in 1942, and 0.91 cent per mile in 1943, and that their average passenger operating ratios were 62.55% in 1942 and 51.84% in 1943, and that their return on book investment, before Federal income taxes, averaged 14.23% in 1942 and 18.07% in 1943; and that the combined freight and passenger operating ratios of the said four lines, respectively, in 1943 were higher than their average passenger operating ratios in 1943, and that the said carriers' existing fares yield them more than the fair return to which they are entitled.

#157. The Interstate Commerce Commission wrongfully and arbitrarily set forth in its Report certain statistical facts, particularly for the atypical month of December, 1943, as to the operating incomes of the Railroads, which

were involved, incorrect, and erroneous, and which gave rise to erroneous deductions and inferences, particularly in finding that certain net railway operating income had steadily declined from a deficit; whereas, in fact, the said net railway operating income was a high profit; and that the action of the said Commission in taking such statistics into consideration was arbitrary; and that the said Commission's action in denying North Carolina's Petition for further hearing to present supplementary statistical evidence, particularly for the complete year 1943 and those for the latest available months of the year 1944, so as to clarify and complement the incomplete and confusing statistics which the said Commission incorporated in its Report, and so as to rebut the inferences drawn therefrom by the said Commission was arbitrary; in proof whereof North Carolina refers [fol. 18] to the affidavit of Frank A. Downing attached hereto and marked Appendix 156.1, which shows that the net revenues from railway operations in the year 1943 were greater than in 1942; and which further shows that the net railway operating income of the class one carriers in the southern region for the months of January, February and March, 1944, respectively, was greater than their net railway operating income for the atypical month of December, 1943; and that the month of December, 1943, does not truly represent that the trend of railroad earnings is downward.

#158. The said Commission erred as a matter of law in requiring and authorizing the Railroads by its Order to increase the intrastate fare from 1.65 cents to 2.2 cents during times of excessively high earnings of the Railroads under war conditions as a means of offsetting deficits incurred in passenger train operations during times of law earnings under pre-war conditions, and the said Commission erred in not heeding the principle of law which was enunciated in *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 62 S. Ct. 736, at page 590 (747) and which principle was invoked by North Carolina in its Brief, at pages 36.44 and its Petition for Reconsideration at pages 20-31, that losses of the business in one year are not to be restored by adding them to the rate base on which a fair return and depreciation allowance is earned.

#159. The said Commission erred as a matter of law in basing its finding with respect to the Railroads' rates of return on value of their carrier property during the war

years of 1942 and 1943 and at the time of the rendition of its Report in March, 1944, upon income left after deducting federal income taxes from net income—commonly called "after federal income taxes"—contrary to the principle of law which the said Commission has adhered to in *Reduced Rates, 1922*, 68 C. C. 676, 683, and *Increased Rates, 1942*, 248 I. C. C. 545, —that railway corporations should, like other corporations, pay their federal income taxes out of the income rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable them to retain the designated fair return over and above the tax. (#115.)

#160. The said Commission action was arbitrary in failing to find, as specifically requested by North Carolina in its Brief at pages 35-36, that the railroads' rates of return were excessive in the war years of 1942 and 1943, [fol. 19] even when computed upon income from which federal income taxes had been deducted. (#1

#161. The action of said Commission was arbitrary in failing and refusing to base its findings as to reasonableness of fares upon the evidence of record during the existing war-conditions, and the reasonable expectancy that such war-conditions will continue for some years, all as specifically requested by North Carolina in its Brief, page 41, (#112.) and Petition for Reconsideration. (#115.).

#162. The said Commission's action was arbitrary in finding that the intrastate fare was subnormal, in that the evidence conclusively shows that the intrastate fares during the years 1942 and 1943 were not subnormal or unreasonably low or non-compensatory; and by such finding the said Commission seeks by indirection to determine the reasonableness per se of the North Carolina intrastate coach fares, a determination which, the Supreme Court of the United States said, lies with the State authority and not with the Interstate Commerce Commission.

As to the Difference in Fares

#163. The Interstate Commerce Commission erred as a matter of law in reaching its conclusion No. 2 that the intrastate fares are lower than the interstate fares, and in basing its findings as to the reasonableness of the fares upon the

mere comparison, mile for mile, of the intrastate fare with the interstate fare; whereas, the Supreme Court of the United States has said, a mere difference between particular rates on interstate and intrastate traffic is not sufficient.

As to the Conditions Affecting Travel, Interstate and Intrastate

#164. The said Commission's conclusion No. 3 that the conditions affecting coach travel intrastate are substantially similar to those interstate is not supported by evidence from which it fully appears that such conditions are substantially similar; whereas uncontradicted evidence shows that there are restrictions against the use of deluxe, streamlined, reserved seat coaches by North Carolina intrastate travelers so that almost no intrastate travelers in North Carolina can use such coaches but are required to use delapidated, over-crowded, non-reserved seat coaches.

[fol. 20] *As to the Finding of Advantage and Preference*

#165. Said Commission's conclusions Nos. 4 and 6; that the difference in fares causes undue and unreasonable advantage and preference to intrastate passengers, and undue and unreasonable disadvantage and prejudice to interstate passengers, is without any evidence to support it.

#166. The said Commission's action was arbitrary in failing to find, as requested by North Carolina, that no person, firm, corporation or association representing travelers coach fares in any of the four states of Kentucky, Tennessee, Alabama and North Carolina.

#167. The said Commission erred as a matter of law in making such findings of preference and prejudice in the absence of any complaint or evidence by or on behalf of any travelers or locality that such difference between the interstate and intrastate fares was in fact preferential of intrastate passengers or localities, or prejudicial to interstate passengers or localities, and in failing to consider the fact that there was and is no evidence submitted by any traveler for hire, or any locality, complained of the lower intrastate or operates to his or its disadvantage or injury or damage in any way or in any manner whatsoever; and that unless and until such evidence is before the said Commission, said

Commission has no power or authority to impose its authority over that of the State authority.

#168. The said Commission erred in reaching the said conclusion that undue preference exists in that it does not clearly appear that the evidence warranted the finding that any particular locality or travelers in interstate commerce are subjected to any undue prejudice or disadvantage by reason of the existence of the lower intrastate coach fares in North Carolina.

Revenue Needed

#169. The Commission's conclusion No. 5, that respondents' revenues fail by at least $525,000 per annum in North Carolina to contribute its fair share of the revenue required to enable respondents to render adequate and efficient transportation service, is arbitrary and without any evidence to support it; whereas, on the contrary, the evidence shows that the respondents are rendering exceptionally efficient [fol. 21] transportation service in view of existing war conditions, and that they are not in need of and entitled to any additional revenues, in proof whereof North Carolina refers to the affidavit of Frank A. Downing Appendix 156.1, which shows that the four North Carolina carriers earned rates of return, before federal income taxes, of 14.23% in 1942, and 18.07% in 1943, and that their net revenues from railway operations in January, February and March, 1944, were extremely high and over-profitable.

#170. It did not and does not clearly appear that the evidence warranted the finding that the application of the existing intrastate coach fares results in an impairment of the railroads' revenues which causes an undue burden upon the railroads' interstate revenues or obstruction to rendition of adequate and efficient transportation service.

Unjust Discrimination Against Interstate Commerce

#171. The said Commission erred as a matter of law in its conclusion No. 6 in finding that the difference between the intrastate and interstate coach fares cause and will cause unjust discrimination against interstate commerce, in that the Railroads in the proceeding before the North Carolina Commission disclaimed that their petition was based upon a need for the added revenue (tr., #109., page

172), and in that the evidence shows that the four North Carolina carriers in the years 1942 and 1943 earned excessive rates of return on investment (Frank A. Downing's Affidavit, Appendix 156.1).

#172. The Commission erred in making such finding of unjust discrimination against interstate commerce, meaning that the intrastate fares placed a revenue burden upon the carriers which prevents them from earning a fair return on investment, in that it did not and does not fully appear that the evidence warranted the finding that the railroads are in need of any additional revenue or that there was or is any unjust discrimination against interstate commerce within the meaning of that term as applied in enforcing the provisions of Section 13(4) of the Interstate Commerce Act.

#173. Said Commission's finding of unjust discrimination is arbitrary and unlawful in that the Commission did not make any findings supported by evidence of any facts which would suffice to constitute an unjust discrimination against interstate commerce in violation of Section 13(4) of the Interstate Commerce Act, or that the intrastate coach fares resulted in an impairment of the income of the Rail-
[fol. 22] roads which causes any undue burden upon the carriers' interstate commerce.

#174. The said Commission erred as a matter of law in failing and refusing to correct, as specifically requested by North Carolina, its mis-statement of North Carolina's position as being that the intrastate coach fares in North Carolina properly should be on a lower level than the interstate fares, whereas North Carolina's position was and is that the intrastate coach fares for travel in non-reserved seat coaches should be lower than the fares for travel in reserved seat coaches whether the travel be intrastate or interstate. (#115.)

#175. The said Commission erred as a matter of law in setting forth in its Report, and in considering certain statements relating to the future avoidance of rationing of passenger travel, as to which there was and is no evidence whatsoever, and no issue in the proceeding before that Commission; and the said Commission erred in denying North Carolina's prayer at page 19 of its Petition for Reconsideration, that such findings and discussions in the said Report be deleted.

#176. The said Commission erred as a matter of law in giving consideration to its lengthy findings as to whether intrastate fares may be used to defeat interstate fares, whereas there is no evidence, and the Commission so finds, to support a finding that interstate travellers defeat the interstate fares. (#115.)

#177. The said Commission erred as a matter of law in ignoring and failing to take into consideration the evidence presented and contentions urged by the Price Administrator against any increase in the intrastate coach fares in North Carolina, Kentucky, Tennessee and Alabama during war conditions. (#115.)

#178. North Carolina further avers and hereby tenders the affidavit of H. M. Nicholson, Director of Traffic of the North Carolina Utilities Commission, attached hereto and marked Appendix 178.1 and made a part hereof to prove that the intrastate coach fares which are paid to the Railroads by the employes of the State of North Carolina, and by citizens of North Carolina, are in small sums of money per trip; that the tickets, which are the only receipt for the payment of such fares, are collected by the train conductors; that, if the intrastate fares were increased under the said [fol. 23] Order of the Interstate Commerce Commission, and the said Order should hereafter be set aside, restitution to each traveller for each trip would be a practical impossibility and the damage to the travelling public would be irreparable and could not be compensated for or adequately redressed by any suit or suits, and North Carolina and its employes and its citizens have no plain, adequate and complete remedy at law available to them in the premises.

#179. The said action of said Commission in making its said Order of May 8, 1944, constitutes an unlawful invasion of the sovereign rights of the State of North Carolina reserved to it by the Constitution of the United States and of the citizens of the State of North Carolina and is without any warrant or authority of or under the Constitution of the United States; and further the said Interstate Commerce Commission was and is without jurisdiction to enter said Order.

#180. The said action of said Interstate Commerce Commission constitutes an unlawful exercise of power by the Interstate Commerce Commission and is without warrant

or authority of or under the Constitution of the United States.

#181. And your petitioners allege that the authority of the State of North Carolina acting in its sovereign capacity over its own intrastate rates was at all times and is paramount and superior to Federal authority with respect to said rates until and unless said State authority actually conflicts with the Federal authority to regulate interstate commerce; and that the Interstate Commerce Commission is without the statutory power to invade the domain of the State of North Carolina in derogation of said State authority until and unless it shall be made to clearly appear from lawful evidence that the jurisdictional facts exist which warrant the Interstate Commerce Commission in invading said domain of the State of North Carolina; and that whether or not such jurisdictional facts exist and have been made to clearly appear from lawful evidence is a judicial question which this Court under the Constitution of the United States (and in particular under Section 1 of Article IV thereof, and the Tenth Amendment thereof, of which your petitioners claim the benefit and protection), is bound to determine for itself in this cause according to the established forms of law, anything in the Interstate Commerce Act as amended to the contrary notwithstanding. And your petitioners are entitled to a trial de novo upon such jurisdictional facts by this Court and hereby make demand for such trial.

[fol. 24] #182. Wherefore, your petitioners respectfully pray as follows:

#182.1. That process may issue against the defendants, United States of America and Interstate Commerce Commission, an administrative tribunal of the United States, with service thereof, and of this petition in the manner prescribed by statute in such cases made and provided.

#182.2. That upon the filing of this bill the Judge of this Court call to his assistance two other judges, one of whom shall be a Circuit Judge; that this Honorable Court will examine the evidence taken before said Commission and determine for itself, independently of any determination or finding of said Commission, whether or not such facts warranting such findings, which are prerequisite to the jurisdiction of the Commission to invade the domain of

the State of North Carolina, have in fact been made to appear clearly by the evidence.

#182.3. That this Court order, adjudge and decree that the said Report dated March 25, 1944, and Corrected Order dated May 8, 1944, are beyond the authority of said Interstate Commerce Commission and are without warrant in law and null and void and that said Report and Order be set aside and annulled.

#182.4. That this Court will allow a temporary stay or suspension of the operation of the said Order of the said Commission pending the application for the injunction herein stated.

#182.5. That this Court will grant to petitioners herein an interlocutory order setting aside and enjoining the enforcement of said Corrected Order of May 8, 1944, of said Commission and any and all further proceedings thereunder, and that such interlocutory order continue in force until further order of this Court.

#182.6. That upon final hearing this Court will make and enter a decree and order herein annulling, setting aside and enjoining the said Order of said Interstate Commerce Commission and permanently enjoining the enforcement thereof.

#182.7. That your petitioners may have such other and further relief in the premises as to the Court shall seem meet and just and as equity may require.

[fol. 25] And your petitioners will ever pray, etc.

State of North Carolina by Harry McMullan, Attorney General and Stanley Winborne, Fred C. Hunter and Robert Grady Johnson, as and constituting North Carolina Utilities Commission, By J. C. B. Ehringhaus and F. C. Hillyear, Special Counsel for said State of North Carolina and North Carolina Utilities Commission. J. C. B. Ehringhaus, F. C. Hillyer.

June 5, 1944.

Address of Petitioners' Attorneys: J. C. B. Ehringhaus, Wachovia Bank Building, Raleigh, N. C. F. C. Hillyer, 227 West Forsyth Street, Jacksonville, 2, Fla.

[fol. 26] *Duly sworn to by Stanley Winborne. Jurat omitted in printing.*

[fol. 27] APPENDIX #141.1

North Carolina Utilities Commission, Raleigh, N. C.

Stanley Winborne, Chairman. Fred C. Hunter, Commissioner. R. G. Johnson, Commissioner

Docket No. 2789

Before the North Carolina Utilities Commission

In the Matter of Petition of railroads Operating in North Carolina for Authority to Increase Their Basic Coach Fares from 1.65 Cents Per Mile to 2.2 Cents Per Mile for Civilian Travel and to Make Other Adjustments in Passenger Fares.

Supplemental Report and Order

Following the hearing herein on May 20, 1943, our report and interlocutory order was entered on July 8, 1943, wherein certain statistical evidence of record at that stage showing financial results of passenger service operations, was discussed. Among other references to said statistics it was stated:

> "The evidence which brings the operating results of the seven Class I railroads up through December 31, 1942, indicates a very probable need for additional revenue from coach fares by two of the carriers, viz., Carolina, Clinchfield and Ohio Railway and Norfolk Southern Railway Company."

It is also stated in the report that one of the two railroads mentioned in the foregoing quotation is situated in the western part of the State while the other is located in the eastern part of the State; both of them away from the dense passenger traffic lanes. The former report refers to the remarkable increase of revenue and income in 1942 over 1941 from passenger operations by the primary petitioning carriers, viz., Atlantic Coast Line, Seaboard Air Line and the Southern Railway, and the lack of evidence: "to indicate an immediate abatement of the trend thus apparent."

[fol. 28]' In light of the grounds upon which petitioners chose to stand it does not seem logical that failure to submit evidence of unit expenses to justify the drastic increases sought is other than an act of deliberate omission; and to supply that deficiency with respect to petitioning carriers in the ascending income group we carried out our purpose as expressed in the prior report herein, petitioning the Interstate Commerce Commission to institute an investigation into the reasonableness of the interstate fares. The Federal Commission denied our petition but considered the relationship of existing interstate and intrastate civilian coach fares in a proceeding on petition of the petitioning carriers herein under I. C. C. Docket No. 29036, reported on March 30, 1944. Our petition filed April 26, 1944, with the Federal Commission seeking an extension of time within which to adjust certain intrastate fares; for further hearing to receive supplemental statistical evidence; for modification of certain findings; reargument and reconsideration; to the contrary notwithstanding and following motion of the North Carolina lines, petitioners in N. C. U. C. Docket No. 2789 and I. C. C. Docket No. 29036, the Federal Commission entered an order requiring movant carriers to establish the increase sought on North Carolina Intrastate traffic on or before July 1, 1944, upon the usual posting and filing notice of not less than 30 days, and at the same time ordered denial of our petition of April 26, 1944.

Statistics submitted in evidence at the hearing in our Docket No. 2789, show results of passenger operations as of December 31, 1942, but not thereafter. In the meantime since service of the Federal Commission's report in Docket No. 29036, on March 30, 1944, we have endeavoured to supplement the record in our Docket No. 2789, by requesting certain statistics of the carriers to show passenger operating results for the entire year of 1943. As supplemented [fol. 29] the record shows continued deficits in 1943 incurred by the Carolina Clinchfield and Ohio Railway and the Norfolk Southern Railway Company. On the other hand the "Net Revenue From Railway Operations" in passenger service of the trunk lines continued to surge upward through 1943, as may be noted from the tabulation set out in Appendix "A" hereto. The passenger operating ratio of the Carolina Clinchfield and Ohio Railway of 111.4 for 1943 shows considerable improvement over that of 144.4 for 1942, but that the expense of supplying the service is still

greater than the revenue received therefrom. However, adversity of the Norfolk Southern Railway Company's ratio of 133.3 in 1943 is greater than that of 109.0 for the preceding year of 1942.

The remarkably low ratios of the trunk lines in 1942, were even more favorable to those carriers in 1943. Ranging from 57.5 for the Southern Railway Company in the former year to 72.0 for the Louisville and Nashville Railroad Company, the outgo to these carriers to earn a dollar or 100 cents in 1943 was further reduced to a range of 48.8 for the Southern Railway Company, the lowest, to a high of 55.3 for the Atlantic Coast Line Railroad Company.

There is no evidence of record before us with respect to the results of passenger operations by several of the petitioning lines, viz., Aberdeen and Rockfish Railroad Company, Atlantic and East Carolina Railway Company, Carolina and Northwestern Railway Company and others of the so-called short line category. As to those lines we are not now in a position to determine whether they lack sufficient revenues to meet their needs. However, after again considering the evidence of record as supplemented it is clear that the four strong trunk lines shown in the appendix hereto with such magnificient net revenues from railway operations in passenger service and such low ratios, have failed to show their expenses per coach passenger mile in [fol. 30] relation to the existing intrastate record shows continued deficits in 1943 incurred by the Carolina Clinchfield and Ohio Railway and the Norfolk Southern Railway Company. On the other hand the "Net Revenue From Railway Operations" in passenger service of the trunk lines continued to surge upward through 1943, as may be noted from the tabulation set out in Appendix "A" hereto. The passenger operating ratio of the Carolina Clinchfield and Ohio Railway of 111.4 for 1943 shows considerable improvement over that of 144.4 for 1942, but that the expense of supplying the service is still greater than the revenue received therefrom. However, adversity of the Norfolk Southern Railway Company's ratio of 133.3 in 1943 is greater than that of 109.0 for the preceding year of 1942.

The remarkably low ratios of the trunk lines in 1942, were even more favorable to those carriers in 1943. Ranging from 57.5 for the Southern Railway Company in the former year to 72.0 for the Louisville and Nashville Railroad Company, the outgo to these carriers to earn a dollar or 100

cents in 1943 was further reduced to a range of 48.8 for the Southern Railway Company, the lowest, to a high of 55.3 for the Atlantic Coast Line Railroad Company.

There is no evidence of record before us with respect to the results of passenger operations by several of the petitioning lines, viz., Aberdeen and Rockfish Railroad Company, Atlantic and East Carolina Railway Company, Carolina and Northwestern Railway Company and others of the so-called short line category. As to those lines we are not now in a position to determine whether they lack sufficient revenues to meet their needs. However, after again considering the evidence of record as supplemented it is clear that the four strong trunk lines shown in the appendix hereto with such magnificient net revenues from railway operations in passenger service and such low ratios, have failed to show their expenses per coach passenger mile in [fol. 31] relation to the existing intrastate civilian coach fares and revenues. In the absence of such proof at this time from the four strong trunk lines, and unless and until the so-called short line group submit evidence we shall reserve to the future any further findings with respect to those two groups of carriers, which carriers are free to offer evidence, or as the case may be, to improve the quality of that thus far adduced. The door is still open, it has never been closed.

The record as supplemented clearly shows a need of additional revenue from passenger operations by the two Class I petitioners which continued to sustain deficits throughout 1943; it is therefore,

Ordered, That the Norfolk Southern Railway Company and the Carolina Clinchfield and Ohio Railway be and the same are hereby authorized to increase their one-way fares for intrastate transportation of civilian passengers traveling in coaches to 2.2 cents per mile, and to increase their round-trip fares for civilian passengers traveling in coaches to the basis of 180 per cent of the one-way coach fares of 2.2 cents per mile or 1.98 cents per mile traveled. Said round trip fares to be subject to a limitation of three months.

By the Commission.

This 16th day of May, 1944.

(S.) Stanley Winborne, Chairman. (S.) Fred C. Hunter, Commissioner. (S.) R. G. Johnson, Commissioner. (Seal.)

[fol. 32] APPENDIX #156.1

STATE OF NORTH CAROLINA,
County of Wake:

Affidavit of Frank A. Downing

Before me, a Notary Public in and for the State of North Carolina, personally appeared Frank A. Downing, who being by me first duly sworn deposes and on oath says: That he is a citizen of Raleigh, North Carolina; that he is, and for the four years past, has been employed as Rate Specialist by the North Carolina Utilities Commission; that he has had more than fifteen years experience in statistical and accounting work; that as part of the duties of his employment he is required to and does study the current statistics of operations and income and the like of common carrier railroads as reported by the carriers to, and as required by law and by the Interstate Commerce Commission and the North Carolina Utilities Commission;

And that he is familiar with the brief of the North Carolina Utilities Commission dated February 16, 1944, in a proceeding before the Interstate Commerce Commission, intitled "North Carolina Intrastate Coach Fares, Docket No. 29036," and the statistics and computations set forth in pages thirty-eight to fifty-three of said brief, and the computations therein made of the expense per passenger mile in coaches of 1.75 cents for the year 1937, and 0.98 of one cent for the year 1942, and 0.81 of one cent for the year 1943 of six common carrier railroads operating in North Carolina; that as to two of the said six carriers, to-wit, the Carolina, Clinchfield and Ohio Railway and Norfolk Southern Railway Company, the North Carolina Commission has granted their application to increase their coach fares for intrastate travel within North Carolina;

And that the statistics of the four remaining carriers, Namely: Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Seaboard Air Line Railway Company and Southern Railway Company for the years 1942 and 1943 show that they incurred average operating expenses per passenger mile in coaches of 0.97 of one cent for 1942 and 0.91 of one cent for the year 1943;

And that the said average expenses per passenger mile in coaches, namely 0.97 cent for 1942, and 0.91 cent for

1943 were derived from statistics reported by said carriers to the Interstate Commerce Commission, and furnished to the North Carolina Utilities Commission by the Interstate [fol. 33] Commerce Commission in letters dated March 3, 1944 and April 3, 1944 from Mr. M. O. Lorenz, Director of Interstate Commerce Commission Bureau of Statistics, addressed to Mr. H. M. Nicholson, Director of Traffic of the North Carolina Utilities Commission, Raleigh, N. C., in tables showing for said four carriers the following aggregate statistics for the twelve months ending December 31, 1943 and 1942:

	1943	1942
Passenger Revenue in Coaches	$119,641,756	$59,628,629
Passenger Miles in Coaches	6,812,586,122	3,826,231,523
Passenger Train Coach Miles	155,512,389	122,413,983

And that the average passenger operating ratios of the four said lines were 62.55 for the year 1942 and 51.84 for the year 1943, which averages are derived from the aggregate of the passenger operating revenue and passenger operating expenses of each of said four carriers as they appear in their respective published reports of statistics to the I. C. C. and N. C. U. C., and which mean that out of each dollar of passenger revenue received for the four said carriers there was needed for passenger expenses only 62.55 cents in 1942 and 51.84 cents in 1943;

And that for the year 1942 dividing the said aggregate coach passenger revenues by the aggregate coach passenger miles produces an average revenue per coach passenger mile of 1.56 cents; and multiplying that figure by the operating ratio of 62.55 produces an average expense per passenger in coaches of 0.97 cent per mile; and that similarly for the year 1943 the said aggregate coach passenger revenues divided by the coach passenger miles produces an average revenue per coach passenger mile of 1.755 cents; and multiplying that figure by the operating ratio of 51.84 percent produces expense per passenger in coaches of 0.91 cent per mile;

And that the said expenses per passenger mile in coaches of 0.97 cent in 1942, and 0.91 cent in 1943 are substantially less than the existing one way coach fare in North Carolina

of 1.65 cents, and were only 58.8% in 1942 and 55.1% respectively of the intrastate fare of 1.65 cents; that based on his experience he is of the opinion and believes that the North Carolina one way coach fare of 1.65 cents per passenger mile for the years 1942 and 1943 yields to said four carriers far more than sufficient to yield a fair return to said carriers from coach passenger traffic;

And that the combined freight and passenger operating ratios of the four respective carriers for the years 1942 and 1943 as they appear in their Annual Reports to the Commission, were as follows:

[fol. 34]

	Total Operating Ratios	
	1942	*1943*
Atlantic Coast Line Railroad Co.	54.69	53.2
Louisville and Nashville Railroad Co.	58.66	56.6
Seaboard Air Line Railway Co.	60.78	58.9
Southern Railway Company	55.59	55.6

And that the said combined freight and passenger operating ratios of each of the four respective lines for the year 1943 were higher than the average passenger operating ratio of the four said carriers for the year 1943 of 51.84%;

And that the net railway operating incomes in the aggregate of the four said carriers before Federal Income Taxes for the years 1942 and 1943, respectively, were $214,412,228 and $277,118,886; and that the rates of return upon book investment in the aggregate of the four said carriers, based upon said net railway operating incomes before Federal Income Taxes was 14.23% in 1942 and 18.07% in 1943, as set forth in the appendix hereto.

And that the net revenues from railway operations (before deduction of both Federal Income and other taxes and equipment and joint facility rents) of the Class I railroads in the Southern Region in the aggregate during the calendar years of 1942 and 1943 were $429,960,167 and $540,337,060, respectively, an increase of 25.7% 1943 over 1942.

And that the aggregate net railway operating income (after deduction of all taxes and rents) was less by $19,491,732 or 9% in 1943 than in 1942; but that there was not a deficit in the said aggregate net railway operating incomes in either of the said calendar years.

And that said aggregate net railway operating incomes of said railroads for the latest four months for which the figures are available are as follows:

Month	*Net Railway Operating Income*
December, 1943	$11,035,492
January 1944	14,411,720
February 1944	15,555,855
March 1944	15,664,330

And that increases over the atypical month of December, 1943, are, by subtraction in the tabulation next above, $3,376,228, $4,520,363 and $4,628,838 for January, February and March 1944, respectively, indicating an upward trend in said net railway operating incomes of said carriers in those months of 1944 as compared with December 1943.

And that said net revenues from railway operations and net railway operating incomes of said carriers for the cal- [fol. 35] endar years 1942 and 1943 and for the months of December 1943 and January, February and March 1944 were obtained from monthly statement No. M-100 issued and made public by Interstate Commerce Commission, Bureau of Transport Economics and Statistics.

Frank A. Downing, Affiant.

Subscribed and sworn to before me this 31 day of May, 1944. Edgar Womble, Notary Public. My Commission Expires: July 27, 1945. (Seal.)

[fol. 36]

	(1) Book Investment In Transportation Property (Dollars)	(2) Accrued Depreciation and Accrued Amortization of Defense Projects (Dollars)	(3) Cash and Materials adn Supplies (Dollars)	(4) Net Book Investment Plus Cash and Materials and Supplies (Dollars)	(5) Net Railway Operating Income Before Federal Income Taxes (Dollars)	(6) Rate of Return (Percent)
			December 31, 1942			
A. C. L.	288,086,363	36,449,363	24,769,153	276,406,153	41,883,550	15.15
L. & N.	468,137,904	84,662,233	42,474,392	425,950,063	61,810,790	14.51
S. A. L.	277,935,537	34,892,446	21,717,174	264,760,265	35,127,070	13.27
Sou.	553,361,481	47,336,531	33,396,778	539,421,728	75,590,818	14.01
Total 4 Lines	1,587,521,285	203,340,573	122,357,497	1,506,538,209	214,412,228	14.23
			December 13, 1943[v]			
A. C. L.	295,397,411	41,403,099	35,091,516	289,085,828	58,257,222	20.15
L. & N.	474,431,692	93,404,699	52,913,268	433,940,261	81,789,976	18.85
S. A. L.	284,170,710	38,142,037	26,273,512	272,302,185	44,704,000	16.42
Sou.	553,893,127	54,765,557	39,401,738	538,529,308	92,367,688	17.15
Total 4 Lines	1,607,892,940	227,715,392	153,680,034	1,533,857,582	277,118,886	18.07

Source:

Annual Reports of the four carriers to the Interstate Commerce Commission.
Columns (1) and (3)—Schedule 200A:
Column (2)—Schedules 285 and 290.
Column (5)—Schedules 300I and 350.

Computations:

Column (4) results from subtracting Column (2) from Column (1) and adding Column (3) to the difference.
Column (6) is the percentage ratio of Column (5) to Column (4).

Raleigh, N. C.
May 23, 1944.

[fol. 37] APPENDIX

STATE OF NORTH CAROLINA,
County of ——, ss.:

Affidavit of H. M. Nicholson

Before me, a Notary Public in and for the State of North Carolina, personally appeared H. M. Nicholson, who being by me duly sworn deposes and on oath says; that he is Director of Traffic of the North Carolina Utilities Commission, and a citizen of Raleigh, North Carolina; that he travels in coaches between points within the State of North Carolina and that many thousands of other persons so travel; that he knows of his own knowledge that the fares paid by travelers for intrastate coach travel in North Carolina are usually in small sums of money, in cash, for which a ticket is given by the railroad ticket agent; that the said tickets are taken from the passengers on the train by the train conductors and that no other receipt is given to the passengers for the payment of the fare; that if such fares should be increased under Order of the Interstate Commerce Commission and afterwards held to have been unlawfully increased, there would be no practicable method of reimbursing the travelers for the difference between the unlawful and the lawful charges and that the damage to himself and the traveling public would be irreparable and could not be compensated for or adequately redressed.

H. M. Nicholson.

Sworn to and subscribed before me this 31 day of May A. D 1944. Edgar Womble, Notary Public. My Commission expires July 27, 1945. (Seal.)

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed June 5, 1944

To the Honorable the Judges of the District Court of the United States in and for the Eastern District of North Carolina, Raleigh Division:

Comes now Charlotte Shippers & Manufacturers Association, Inc., and respectfully represents unto this Honorable Court as follows:

Petitioner is a non-profit corporation organized and existing under the laws of the State of North Carolina, with its principal office at Charlotte, N. C., and its executive Vice President is W. S. Creighton of Charlotte, N. C.; and said petitioner is engaged primarily in the protection of its large membership of shippers and manufacturers in matters pertaining to transportation; the said petitioner intervened in the proceeding before the Interstate Commerce Commission entitled, North Carolina Intrastate Coach Fares, No. 29036, and is therein a complainant against the proposed increases in the fares for civilian travel in passenger coaches within the State of North Carolina; and this petitioner joined the North Carolina Utilities Commission in presenting a brief, oral argument and a petition for reconsideration, etc., in said proceeding before the Interstate Commerce Commission and this petitioner is entitled to intervene in the above entitled cause. U. S. C. Title 28, Sec. 45a.

Dated at Charlotte, N. C., this 26 day of May, 1944.

Charlotte Shippers & Mfrs. Asso., Inc. By W. S. Creighton, Vice President.

Sworn to and subscribed before me this 26 day of May A. D. 1944. Thos. C. Hayes, Notary Public. (Seal.) My Commission expires 2/28/45.

J. C. B. Ehringhaus, Wachovia Bank Bldg., Raleigh, N. C. F. C. Hillyer, 227 West Forsyth St., Jacksonville 2, Fla.

[fol. 39] Service accepted and copy received this 6th day of June 1944.

United States of Americ By Robert L. Pierce. Interstate Commerce Commission. By J. Stanley Payne.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed June 5, 1944

To the Honorable the Judges of the District Court of the United States in and for the Eastern District of North Carolina, Raleigh Division:

Comes now the North Carolina Division of the Travelers' Protective Association of America, and B. F. Russell of North Carolina, Chairman of the Transportation Committee of the T. P. A. of A., and respectfully represents under this Honorable Court as follows:

The said Travelers' Protective Association of America is a non-profit corporation organized and existing under the laws of the State of Missouri, and having a division in the State of North Carolina and a Post at Raleigh, N. C., and that the North Carolina Division of said Association has more than 3,600 members; that the object of the Association is to secure benefits for the members and improvements in services of members of the Association throughout the State as well as insurance benefits that they enjoy; that the said B. F. Russell is a traveling salesman for E. F. Craven Co. of Greensboro, N. C., engaged in the sale of heavy construction equipment, contractors' equipment and things of that kind, and having six traveling salesmen within the State of North Carolina who travel in coaches by railroad in the course of their business; that the said Association, North Carolina Division and Post intervened in the proceeding before the Interstate Commerce Commission entitled North Carolina Intrastate Coach Fares, I. C. C. Docket No. 29036, as a complainant against the proposed increases in intrastate coach fares, and joined with the North Carolina Utilities Commission in said proceeding, on brief, on petition for reconsideration, et cetera, and on oral argument; that said North Carolina Division and B. F. Russell have an interest in the proceeding before the Court to set aside an order of the Interstate Commerce

Commission and entitled to intervene in the above entitled cause. U. S. C. Title 28, Sec. 45a.

[fol. 41] Dated at Raleigh, N. C., this 26 day of May, 1944.

North Carolina Division of Travelers' Protective Association of America. By B. F. Russell, Chairman, Transportation Committee of the Raleigh Post of the T. P. A. of A.

Sworn to and subscribed before me this 26 day of May A. D. 1944. Edgar Womble, Notary Public. (Seal.) My Commission Expires July 27, 1945.

J. C. B. Ehringhaus, Wachovia Bank Building, Raleigh, N. C. F. C. Hillyer, 227 West Forsyth St., Jacksonville, Fla. Attorneys for Petitioner.

[fol. 42] Service accepted and copy received this 6th day of June 1944.

United States of America. By Robert L. Pierce. Interstate Commerce Commission. By J. Stanley Payne.

[fols. 43-44] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING INTERVENTION—Filed June 5, 1944

The foregoing petition of Charlotte Shippers and Manufacturers Association, Inc., to intervene in the above stated cause is granted.

This 5th day of June, 1944.

I. M. Wilkins, District Judge.

[fols. 45-46] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING INTERVENTION—Filed June 5, 1944

The foregoing petition of North Carolina Division of the Travelers' Protective Association of America to intervene in the above stated cause is granted.

This 5th day of June, 1944.

I. M. Wilkins, District Judge.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE AS A PLAINTIFF—Filed June 15, 1944

Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, moves for leave to intervene as a plaintiff in this action, and to assert the causes of action set forth in his Complaint (Petition), of which a copy is hereto attached, on the ground that the Price Administrator, on his own behalf and on behalf of the Economic Stabilization Director, was an intervener participating in the proceeding of the Interstate Commerce Commission leading to the order which is the subject of this suit (Title 28), U. S. C., Sec. 45a); and on the ground that the Economic Stabilization Director and the Price Administrator have administrative duties under the Emer-
[fol. 48] gency Price Control Act of 1942, as amended affected by said order; and as such they have causes of action presenting both questions of law and of fact which are common to the main action.

Respectfully submitted, Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration. Richard H. Field, General Counsel, Office of Price Administration. David F. Cavers, Assistant General Council, Office of Price Administration. Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Division, Office of Price Administration. M. D. Miller, Attorney, Office of Price Administration, 5319 Federal Office Building No. 1, 2nd and D Streets, S. W., Washington 25, D. C.

[fol. 49-50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING INTERVENTION—Filed June 17, 1944

The foregoing petition of Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Adminis-

trator, to intervene as Plaintiff in the above stated cause is granted.

This 16th day of June, 1944.

I. M. Wilkins, District Judge.

[fol. 51] In United States District Court

[Title omitted]

Amended Complaint (Petition.)—Filed June 12, 1944

1. This suit is brought under the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. A. 43-48, to suspend, enjoin, annul, and set aside the order of the Interstate Commerce Commission hereinafter described.

2. Fred M. Vinson is the duly appointed and acting Director of the Office of Economic Stabilization. By virtue of Executive Order 9250 (7 F. R. 7871), issued October 3, 1942, the Director of the Office of Economic Stabilization is the agency designated by the President of the United States to receive notice of any general increase in the rates or charges of common carriers or other utilities over those in effect on September 15, 1942, pursuant to the Stabilization Act of October 2, 1942 (Public Law, 729, 77th Congress, 2nd Session, 50 U. S. C. A.

* * * * * * *

[fol. 15] (App. §§961-971.) By Directive No. 1 (7 F. R. 8758), issued by the Economic Stabilization Director on October 14, 1942, the Price Administrator of the Office of Price Administration was designated as the representative of said Director to receive notices of such general increases in common carrier or other public utility rates or charges under Section 1 of said Stabilization Act (50 U. S. C. A. App. § 961), with authority to intervene and participate in proceedings before Federal, State, and municipal authorities in connection with proposed general increases in such rates and charges; and the said Chester Bowles is the duly appointed and acting Price Administrator of said Office of Price Administration.

3. Pursuant to the direction of said Stabilization Act of October 2, 1942, the President issued Executive Order 9250, mentioned in paragraph 2 hereof, said order stating in part:

> The guiding policy of the (Economic Stabilization) Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of, such administrative programs and in the development of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director. (Title I, Section 4)

[fol. 53] Subsequently, on April 8, 1943, the President issued Executive Order 9328 (8 F. R. 4681), a subsection of said order making the following direction of agencies engaged in regulation of common carrier rates and charges.

> The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program. (Section 4)

4. By order of August 1, 1942, the Interstate Commerce Commission authorized the railroads operating in southern territory, which territory includes the State of North Carolina, to increase passenger coach fares, in interstate commerce, to the basis of 2.2 cents per mile; and by tariffs which became effective on October 1, 1942, the railroads operating in said territory and State made general increases of coach fares for transportation of passengers in interstate commerce to the level of 2.2 cents per mile one-way, and 1.98

cents per mile roundtrip with a return limit of three months. Said increases of fares were protested and the suspension of their operation was requested by the Price Administrator, but the Interstate Commerce Commission declined to suspend.

[fol. 54] 5. By a petition filed on or about October 12, 1942, with the North Carolina Utilities Commission, M. B. Duggan, Chairman of the Southern Passenger Association, for and on behalf of railroads operating in North Carolina except the Norfolk and Western Railway Company, sought to increase passenger coach fares between points within said State to the interstate level as aforesaid. The North Carolina Utilities Commission heard the matter, at which hearing an appearance was made by a representative of the Office of Price Administration as Protestant. The North Carolina Utilities Commission has never finally declined to authorize said increases, but in July 1943 petitioned the Interstate Commerce Commission for a general investigation of the lawfulness of the interstate fares to, from, and through North Carolina. By petition filed with the Interstate Commerce Commission on or about July 31, 1943, the Price Administrator sought a general investigation by the Interstate Commerce Commission of the reasonableness, under present conditions, of interstate coach fares of all railroads in Southern Territory. Said petitions were denied, however, by the Interstate Commerce Commission.

[fol. 55] 6. By petition dated July 22, 1943, filed with the Interstate Commerce Commission, the Aberdeen and Rockfish Railroad Company; Atlantic and East Carolina Railway Company; Atlantic Coast Line Railroad Company; Carolina and Northwestern Railway Company; Carolina and Tennessee Southern Railway Company; Carolina, Clinchfield and Ohio Railway; Carolina, Clinchfield and Ohio Railway of South Carolina, Lessees: Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company; Danville and Western Railway Company; Louisville and Nashville Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers); Southern Railway Company; and Winston-Salem Southbound Railway Company sought an order from said Commission prescribing increased fares to be charged intrastate

passengers within North Carolina to remove alleged unjust and unlawful advantage, preference, prejudice, and discrimination as between intrastate and interstate commerce; whereupon the said Commission heard the matter, at which hearing an appearance was entered for the Price Administrator, on his own behalf and on behalf of the Economic Stabilization Director, as intervener in opposition to said increases in fares.

[fol. 56] 7. By a report decided March 25, 1944, served March 30, 1944, in No. 29036, *North Carolina Intrastate Coach Fares* and related cases (issued under No. 28963, *Alabama Intrastate Fares*) the Interstate Commerce Commission granted the said petition mentioned in paragraph 6 hereof, holding that the Commission would consider entry of an appropriate order if the North Carolina Utilities Commission did not adjust, within thirty days from said service date, the intrastate fares in North Carolina to the level of the corresponding interstate fares contemporaneously maintained by the North Carolina railroads to, from, and through said State; provided, that the aggregate charge made by any of the railroads for the intrastate transportation shall not exceed the aggregate charge made for like accommodations and for a like distance by the same railroad for interstate transportation to, from, or through such State.

8. On April 26, 1944, the Price Administrator filed a petition with the Interstate Commerce Commission, on his own behalf and on behalf of the Economic Stabilization Director, and requested that said Commission reconsider its decision set forth in said report mentioned in paragraph 7 hereof. By an order of May 8, 1944, the Commission denied said petition.

[fol. 57] 9. By another and separate order dated May 8, 1944, as changed by a corrected order of the same date issued on or about May 24, 1944, the Interstate Commerce Commission required the railroads operating in the State of North Carolina to establish, on or before July 1, 1944, upon notice to the Commission and to the general public by not less than 30 days filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, passenger fares for intra-

state transportation in North Carolina which shall be on bases no lower than the passenger fares presently maintained and applied by said railroads for like accom-odations in interstate transportation to, from, and through North Carolina; provided, that the resulting aggregate charge made by any of said railroads for intrastate transportation in North Carolina shall not exceed the aggregate charge made for like accom-odations and for a like distance for the same railroad in interstate transportation to, from, or through such State.

10. In the report mentioned in paragraph 7 hereof, the Interstate Commerce Commission failed or refused to give full effect to wartime conditions and the stabilization legislation, although it was under a duty to do so.

[fol. 58] (a) The Commission erred, as a matter of law, in concluding that its consideration of the stabilization legislation should be limited to a finding that common carriers making rate increases have complied with the requirement of Section 1 of the Stabilization Act, by the giving of notice and consent to intervene to the designated Federal agent. In addition to such a finding, the Commission was under a duty to accom-odate the provisions of the Interstate Commerce Act to the statutory wartime programs of the Emergency Price Control Act of 1942 and the amendatory Stabilization Act of October 2, 1942, and was under a duty to adjust its actions as indicated by the desires of Congress to have the policies of said price control and stabilization legislation leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned.

(b) The Commission failed or refused to determine that increases of coach fares over those in effect on September 15, 1942, were inconsistent with the declaration of Congressional policy in Section 1 of the Emergency Price Control [fol. 59] Act of 1942, namely, that it is necessary to the effective prosecution of the present war, and certain purposes of that Act are, "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices

resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living, * * *"

(c) On the contrary, the findings of the Commission, and the uncontradicted evidence submitted to the Commission by the railroads at the hearing mentioned in paragraph 6 hereof, reveal that the increases of passenger coach fares in the Southern territory and North Carolina over those in effect on September 15, 1942, were abnormal in relation to peacetime conditions, and that said increases were made possible or practical because of inflationary wartime conditions and the restricted use of automobiles during the war [fol. 60] emergency. From December 1, 1933, to November 14, 1937, inclusive, the general basis of interstate and intrastate coach fares in Southern territory and North Carolina was 1.5 cents per mile. From November 15, 1937, to January 14, 1939, inclusive, the general basis of coach fares, interstate and intrastate in said territory and North Carolina, was 2.0 cents per mile. On January 15, 1939, said fares were reduced to the basis of 1.5 cents per mile, to which 10 percent increases were added on February 10, 1942, bringing the basis of said fares to 1.65 cents per mile. Said fares of 1.5 cents per mile were maintained primarily to attract traffic that had been diverted chiefly to private automobiles. The reduction in fares from the basis of 2.0 cents to 1.5 cents per mile, effective January 15, 1939, resulted from the conclusion of certain Southeastern railroads that "it would be to their advantage to restore the former one-way coach fare of 1.5 cents per mile" (I. C. C. Record in No. 29036, Exhibit No. 1, "page 8", document #110 attached to the Petition of the State of North Carolina and the North Carolina Utilities Commission in this action). The adverse effects upon traffic of the increases of said fares for the fourteen months following November 15, 1937, for 6 North [fol. 61] Carolina railroads, are shown by the following data voluntarily submitted by said railroads to the Commission

in their Exhibit No. 9 (see the aforesaid document #110) in the proceeding mentioned in paragraphs 6 and 7 hereof:

Revenue Passenger Miles Per Train Mile
(Exhibit 9, pages 25 and 26)

			1937	47.53	
1931	25.83		1938	37.60	
1932	23.83		1939	46.16	
1933	27.64		1940	53.75	
1934	35.85		1941	75.11	
1935	38.26		1942	145.85	
1936	44.59	1st 7 mo.	1943	211.10	

	Revenue per Passenger Mile in Coaches	Revenue Per coach Mile	Passenger Service Operating Ratio	Passenger Miles per Coach Mile
	Ex. 9, p. 15	Ex. 9, p. 17	Ex. 9, p. 11	Ex. 9, p. 31
1937	1.494¢	22.02¢	117%	14.74%
1938	1.806	19.51	125	10.81
(Percent change	Favorable	Unfavorable	Unfavorable	Unfavorable)
(1937 to 1938	20.88%	11.40%	6.84%	26.66%)
1939	1.395¢	20.17¢	124%	14.46
1940	1.362	23.30	123	17.11
1941	1.403	30.93	101	22.05
1942	1.560	52.44	63	33.62
			1st 7 months 1943	44.96
(Percent change	Favorable	Favorable	Favorable	Favorable)
(1941 to 1942	11.19%	69.54%	37.62%	52.47%)

Economic conditions since 1939 have greatly changed, and the increased intrastate fares required by the Commission, as mentioned in paragraph 7 hereof, will produce [fol. 62] added revenues. The Interstate Commerce Commission failed or refused to determine, however, whether the North Carolina railroads are earning less than a fair return and whether said railroads are in need of the additional revenues from the increased intrastate fares for the purpose of earning a fair return.

(d) In said report the Interstate Commerce Commission failed or refused to be governed by the declaration or finding of Congress in the Stabilization Act of October 2, 1942, that general increases of common carrier rates or charges above those in effect on September 15, 1942, are inflationary *per se*, and that stabilization of such rates and charges is necessary to aid in the effective prosecution of the war.

The said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, having been issued contrary to the

intentions and desires of Congress, transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

11. In the report mentioned in paragraph 7 hereof, the Interstate Commerce Commission acted in disregard of the executive orders of the President set forth in paragraph 3 hereof, although said Commission had both the power and duty to cooperate in the wartime stabilization program [fol. 63] of Congress as set forth in the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942. The said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, having been issued contrary to the said executive order, therefore transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

12. In said report of March 25, 1944, mentioned in paragraph 7 hereof, the Interstate Commerce Commission did not make sufficient findings of basic facts to support the Commission's sixth enumerated finding and conclusion that the North Carolina intrastate coach fares cause and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce. Under the Interstate Commerce Act, the Commission is empowered to prescribe intrastate rates, fares, and charges only after findings of facts that any advantage, preference, prejudice, or discrimination from the intrastate fares causes some result which is undue, unjust, or unreasonable as respects interstate commerce. The said report of the Commission does not state any finding of fact showing any undue, unjust, or unreasonable result caused by the differences between the interstate and intrastate coach fares mentioned in said [fol. 64] report. The said corrected order of May 8, 1944, having been based upon insufficent findings of basic fact, therefore transcends the Commissions constitutional and statutory powers, and is unlawful, void, and of no effect.

13. The record before the Interstate Commerce Commission in the proceeding mentioned in paragraph 6 hereof does not contain substantial evidence to clearly support the sixth enumerated finding mentioned in the preceding para-

graph. Said finding is therefore arbitrary. The Commission's said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, being based upon said arbitrary finding, is also arbitrary, transcends the Commission's constitutional and statutory powers, and is void and of no effect.

14. The Interstate Commerce Commission erred, as a matter law, in its fourth and six enumerated findings of said report of March 25, 1944, mentioned in paragraph 7 hereof, that transportation of interstate passengers in the State of North Carolina, in the same trains and generally in the same cars with intrastate passengers, which interstate passengers are forced to pay higher fares than the intrastate passengers, and that maintenance of such intrastate fares, causes undue and unreasonable advantage and preference of the intrastate passengers, and undue and unreasonable disadvantage and prejudice of the interstate passengers. The said corrected order of May 8, 1944 having been based upon an error of law, therefore transcends the Commissions' constitutional and statutory powers, and is unlawful, void, and of no effect.

[fol. 65] 15. In said report of March 25, 1944, mentioned in paragraph 7 hereof, the Interstate Commerce Commission erred in that part of its fifth enumerated finding that "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service."

(a) The quoted finding was based in part upon findings of facts with respects to so-called passenger service net railway operating deficits from 1936 to 1941, inclusive, incurred while interstate and intrastate coach fares were on the same general basis. The North Carolina railroads are not entitled to regulation by the Commission which will insure that the said railroads' businesses will produce net revenues, nor does the Constitution require that the losses of such businesses in past years be restored from future earnings.

(b) The quoted finding of the Commission was made without consideration of the fact that said Commission had authorized general levels of freight rates to include

a factor for the support of said passenger service because of said deficits. *Passenger Fares and Surcharges*, 214 I. C. C. 174, 227, the Commission said:

> "That the generally unprofitable nature, for the last decade, of the rail passenger service throughout the country has been consistently given consideration by us in determining the reasonableness of freight rates, is amply demonstrated by expressions in our annual reports to the Congress and in numerous decisions * * * ".

[fol. 66] In the *Fifteen Percent Case*, 1937-1938, 226 I. C. C. 41, the Commission authorized the railroads of the country to make a 10 percent increase in freight rates generally, with certain exceptions, and said (p. 54):

> "This deficit in the passenger traffic as a whole has continued from at least 1926, mounting steadily to a peak in 1932, and receding only slightly thereafter. *Passenger Fares and Surcharges*, 214 I. C. C. 174, 182. The interrelation of the freight and passenger traffic has often been commented on by us, and we have declined to accede to the proposition again repeated here by certain protestants that we can authorize no increase in freight rates to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden."

(c) In contradiction to the finding quoted in the opening sentence of this paragraph, the Commission found in said report that beginning with 1942 the principal railroads operating in the State of North Carolina have received net railway operating income from passenger services in excess of expenses; but the Commission failed or refused to make any finding that such net railway operating income was less than a fair return for North Carolina railroads, although evidence on the subject matter was contained in the record before the Commission. On the contrary the Interstate Commerce Commission found in said report that the passenger operating revenues for five principal North Carolina railroads were substantially greater for the 12 [fol. 67] months ended October 31, 1943, than those for 1942; and that the passenger operating ratio (percentage of oper-

ating expenses to operating revenues) for said 5 principal railroads and 2 other railroads operating in North Carolina, as estimated by the witness for the Price Administrator for the first 9 months of 1943, unlike that for 1942, was somewhat more favorable than the freight operating ratio of these railroads for the same period. Said ratios for the first 9 months of 1943 were 52.3 for the passenger service and 57.7 for the freight service, as compared with the 1942 operating ratios of 63.9 and 54.7 for the passenger and freight services, respectively. Rates of return for the said 7 North Carolina railroads, from net railway operating income before deduction of federal income taxes, but after deduction of rent for leased road and equipment, for the 12 months ended October 31, 1943, averaged 18 percent of a base computed from said railroads' book investment in transportation property, plus cash, materials and supplies, less accrued depreciation and accrued amortization of defense projects.

(d) The Commission included within the revenues so required, according to said finding, amounts of increased taxes paid by railroads in the southern region, and did not con-
[fol. 67a] sider net revenues of the said railroads prior to deduction of wartime income taxes.

The said order of May 8, 1944, mentioned in paragraph 9 hereof, having been based upon errors of law, transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

16. The maintenance of passenger coach fares to, from, and between points in North Carolina, in interstate and intrastate commerce upon the general basis of 1.65 cents per mile under present conditions would not impose an undue burden upon nor undue injury to interstate or foreign commerce.

(a) As shown by the attached affidavit of one Doris S. Whitnack, with accompanying tabulations, attached hereto and made part hereof, the 1943 total rate of return for eleven North Carolina railroads, commuted upon by the method described in paragraph 15(c) hereof, was 18.00%. The 1943 operating ratios for the six Class I North Carolina railroads (as classified for statistical purposes by the Interstate Commerce Com-

mission) were 52.06 percent and 57.71 percent for their passenger and freight services, respectively.

(b) As also shown by the said affidavit, the cost of the passenger service in coaches for said six principal North Carolina railroads was about .63 of one cent per mile for 1943, as compared with the present intrastate fares upon the basis of 1.65 cents per mile, and the interstate level of fares upon the general basis of 2.2 cents and 1.98 cents per passenger mile one-way and round-trip, respectively.

[fol. 68] (c) By reason of the aforesaid differences between the costs and fares per passenger mile in coaches for the said North Carolina railroads, under present conditions there is no advantage or preference to persons or localities in intrastate commerce nor disadvantage or prejudice to persons or localities in intrastate commerce, as found by the Commission, which cannot be removed lawfully by reduction of the said interstate passenger coach fares to, from, and through North Carolina to the aforesaid level of the intrastate fares.

There being no undue burden upon interstate or foreign commerce to, from, and between points in North Carolina, from maintenance of passenger coach fares, in interstate or intrastate commerce, at the level of the North Carolina intrastate coach fares, there is no Constitutional jurisdiction (Article I, Sec. 8, cl. 3, and the 10th Amendment) in the United States government to require increases of passenger coach fares in North Carolina, in intrastate commerce, above the level authorized by the North Carolina Utilities Commission for intrastate commerce. The said corrected order of the Interstate Commerce Commission dated May 8, 1944, as described in paragraph 9 hereof, therefore transcends the Commission's constitutional and statutory powers, and is unlawful, void and of no effect.

[fol. 69] 17. In said report of March 25, 1944, mentioned in paragraph 7 hereof, the Interstate Commerce Commission erred, as a matter of law, in its determinations with respect to undue advantage or preference to persons and localities in intrastate commerce and undue disadvantages

or prejudices to persons or localities in interstate commerce, in that part of said report subtitled "Undue advantage, preference, or prejudice." The mere existence of a disparity in rates between intrastate and interstate commerce, for substantially the same service on trains available to both interstate and intrastate passengers, does not justify the conclusion that any advantage or preference to persons or localities in intrastate commerce or disadvantage or prejudice to persons or localities in interstate commerce is undue or unreasonable. The said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, having been based upon error of law, therefore transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

[fol. 70] 18. In said report of March 25, 1944, mentioned in paragraph 7 hereof, the Interstate Commerce Commission erred, as a matter of law, in its determination with respect to discrimination by the intrastate fares against interstate or foreign commerce, in that part of the report subtitled "Unjust discrimination."

(a) The statements in said part of the report were with respect to discriminations against persons or localities, and not with respect to revenue discrimination, if any there be, against interstate or foreign commerce.

(b) Said statements in said part of the report are mere reportorial descriptions of the evidence consisting of the opinions of the railroad respondents in the proceedings before the Commission and of the witnesses on their behalf, and do not constitute findings of basic fact.

The said corrected order May 8, 1944, mentioned in paragraph 9 hereof, having been based upon error of law, therefore transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

19. In said report of March 25, 1944, mentioned in paragraph 7 hereof, the Interstate Commerce Commission erred, as a matter of law, in its finding that the present basis of passenger coach fares, in interstate commerce, to, from, and through North Carolina is just and reasonable, for the reason that such conclusion is not in accordance with the requirements of section 15a of the Interstate Commerce Act.

[fol. 71] (a) The commission failed or refused to be governed by the effects of the increases of fares, over the level in effect on September 15, 1942, upon the movement of traffic by North Carolina railroads under normal or peacetime conditions as described in paragraph 10(c) hereof, but instead based its decision upon changed war-time economic conditions which permitted the increases of fares. In said report the Commission made statements with respect to the endeavor of the railroads to discourage unnecessary travel in cooperation with the Office of Defense Transportation, to avoid the rationing of passenger travel which would tend to be encouraged by reduction in standard passenger fares. In contradiction thereof, however, the Commission found that passenger coach revenues of all Class I railroads in the southern region increased 128.5 percent in the first 10 months of 1943 as compared with the corresponding period for 1942, and also found (finding No. 5) that the revenues of the North Carolina railroads under the lower North Carolina intrastate fares are less by at least $525,000 per annum than said revenues would be if those intrastate fares were increased to the level of the corresponding interstate fares.

[fol. 72] (b) The Commission failed or refused to consider "the need, in the public interest, of adequate and efficient transportation service at the lowest cost consistent with the furnishing of such service," as required by Section 15(a) of the Interstate Commerce Act. The data in paragraph 10(c) hereof indicates by approximation that in 1942 such unit cost of passenger service in coaches was about .98 of 1 cent per passenger mile as compared with the North Carolina intrastate rate of 1.65 cents and the interstate rate of 2.2 cents per mile (revenue per coach mile—52.44¢, multiplied by ratio of passenger service expenses to revenues—.63, divided by passenger miles per coach mile—33.62, equals .98).

(c) The Commission erroneously considered the need of added revenues by North Carolina railroads for the purpose of recouping for passenger service deficits from 1936 to 1941, inclusive; and failed or refused to

consider whether the North Carolina railroads are presently earning a fair return, and failed or refused to consider that the Commission had previously established freight rate levels for the purpose of supporting the passenger service and compensating for such deficits, as mentioned in paragraph 15(b) hereof, which support factor in freight rates has been multiplied by the wartime increase of freight traffic.

[fol. 73] (d) In derogation of the requirements of said section 15(a), the Commission held that "the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services". In making such a holding the Commission erred as a matter of law.

The said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, having been based upon errors of law, therefore transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

20. By said report of March 25, 1944, and the orders of May 8, 1944 mentioned in paragraphs 7, 8, and 9 hereof, the Interstate Commerce Commission has failed to recognize, as a consideration justifying the maintenance of the intrastate passenger fares at a level lower than the interstate fares, that in denying increases of intrastate rates, fares and charges over those in effect on September 15, 1942, the North Carolina Utilities Commission was acting in aid of the effective prosecution of the war in accordance with the policy of Congress as expressed in the said Stabilization Act of October 2, 1942, and as requested of the North Carolina Utilities Commission by the President in said Executive Order 9328 as set forth in paragraph 3 hereof. The said report and orders of the Interstate Commerce Commission therefore interfere with the cooperative efforts of [fol. 74] the North Carolina Utilities Commission to aid in the effective prosecution of the war, contrary to the intention of Congress. The said corrected order of May 8, 1944, having been issued contrary to the intentions and desires of Congress transcends the Commission's constitutional and statutory powers, and is unlawful, void, and of no effect.

21. Unless said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, is restrained and permanently enjoined and set aside, your petitioners will be caused great and substantial injury in the performance of their duties under the Stabilization legislation.

(a) The increased fares will add to the cost of living and will be inflationary to the detriment generally of the wartime program to stabilize prices, rents, and wages.

(b) Common carriers and public utilities will be encouraged to make inflationary increases of intrastate rates and to take advantage of wartime conditions to make excessive and unprecedented profits.

(c) State and municipal regulatory agencies will be discouraged from cooperation in the wartime stabilization program to the end of maintaining rates, fares, and charges in intrastate commerce, in effect in September 15, 1942, which are less than those applicable to interstate commerce; which action may be overruled by the Interstate Commerce Commission to conform intrastate rates, fares, and charges to the interstate levels.

[fol. 75] 22. Plaintiff herein has no adequate remedy at law.

Wherefore, your petitioner says:

First: That his petition be heard by a three judge court at the earliest available date, and that the constitutional and judicial matters be tried de novo with respect to the allegations of paragraph 16 hereof.

Second: That pending the final hearing of this cause, the court issue an interlocutory injunction and restraint enjoining said railroads from complying with said corrected order of May 8, 1944, mentioned in paragraph 11 hereof.

Third: That upon final hearing the court adjudge, order, and decree that said corrected order of May 8, 1944, mentioned in paragraph 9 hereof, is and at all times has

been in violation of the Interstate Commerce Act by reason of the Commission's failure properly to interpret and apply its constitutional and statutory authority to protect interstate commerce from undue and unreasonable burdens from intrastate commerce, and its failure to accommodate the exercise of its powers to the Congressional policies embodied in the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942; and that said corrected order is and has been beyond the lawful authority of the Interstate Commerce Commission, and [fol. 76] wholly null and void; and that said corrected order be perpetually set aside and annulled, and the enforcement thereof perpetually enjoined.

Fourth: That the court grant to your petitioner such other relief as may be proper in the premises.

Respectfully submitted, Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration; Richard H. Field, General Counsel, Office of Price Administration; David F. Cavers, Assistant General Counsel, Office of Price Administration; M. D. Miller, Attorney, Office of Price Administration, 5319 Federal Office Building No. 1, 2nd and D Streets, S. W., Washington 25, D. C.

[fol. 77] *Duly sworn to by M. D. Miller. Jurat omitted in printing.*

[fol. 78] APPENDIX TO AMENDED COMPLAINT

DISTRICT OF COLUMBIA:

Affidavit of Doris S. Whitnack

Before me, a notary public in and for the District of Columbia, personally appeared Doris S. Whitnack, who being by me first duly sworn deposes and on oath says:

1. That she is a resident of the District of Columbia and since July 1941 has been employed as an Economist with the Transportation Branch of the Transportation and Public Utilities Division of the Office of Price Administration, and for about four years has had experience in economics

and statistical work involving use and examination of the statistical and accounting reports filed by railroads with the Interstate Commerce Commission.

2. That on December 29, 1943, she testified at the hearing in Raleigh, North Carolina, in the proceeding before the Interstate Commerce Commission in No. 29036, *North Carolina Intrastate Coach Fares*, giving evidence relating to Exhibit No. 20 in that proceeding.

3. That she has prepared the Tables I, II, and III, attached hereto, from the data set forth in the annual and monthly reports of the railroads named in said tables; filed by said railroads with the Interstate Commerce Commission, and she states that the data and computations in said tables are true and correct to the best of her knowledge, information, and belief.

4. That the 1943 rate of return for the ten North Carolina railroads, named in Table I attached hereto, from total 1943 net railway operating income of said railroads before Federal income taxes, but after deduction of rents for leased road, was 18.00 percent of a total of said railroads' book investments, plus cash, materials and supplies, less accrued depreciation and amortization of defense projects, as of December 31, 1943.

5. That the 1943 operating ratios for the six Class I North Carolina railroads, named in Table II attached hereto, were 52.06 percent and 57.71 percent for their passenger and freight service respectively.

6. That during 1943, the average cost of the passenger service in coaches by the said six North Carolina Class I railroads, named in Table III attached hereto, was about .63 of 1 cent per mile.

Doris S. Whitnack.

[fol. 79] Sworn to and subscribed before me this 10th day of July, 1944. Eugene R. Wood, Sr., Notary Public. (Seal.) My Commission expires Nov. 30, 1945.

(Here follow 2 pasters, folios 80-84)

[fol. 80]

TABLE I

Rates of Return
Railroads Operating in North Carolina
1943

Carrier	Investment in Transportation Property as of Dec. 31, 1943	Cash, Materials and Supplies as of Dec. 31, 1943	Accrued Depreciation as of Dec. 31, 1943	Rate Base as of Dec. 31, 1943	Net Railway Operating Income Before Federal Income Taxes 1943	Rent for Leased Roads 1943	Net Railway Operating Income Before Federal Income Taxes Less: Rent for Leased Roads—1943	Rate of Return 1943
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1. Aberdeen and Rockfish R. R. Co.	$548,264	$58,575	$97,107	$509,732	$69,092	$.....	$69,092	13.55%
2. Atlantic and East Carolina Ry. Co.	176,483	317,002	27,008	466,477	225,374	127,958	97,416	20.88
3. Atlantic Coast Line R. R. Co.	295,397,411	35,091,516	2,127,812	288,361,115	58,257,222	208,341	58,048,881	20.13
4. Carolina and Northwestern Ry. Co.	3,477,084	298,252	71,993	3,703,343	162,972	.....	162,972	4.40
5. Clinchfield R. R. Co.	4,560,738	5,917,668	826,278	9,652,128	5,928,597	2,173,233	3,755,364	38.91
6. Danville and Western Ry. Co.	1,628,969	226,750	64,159	1,791,560	25,399	.....	25,399	1.42
7. Louisville and Nashville R. R. Co.	472,561,455	52,913,268	13,143,876	412,330,847	81,789,976	301,691	81,488,285	19.76
8. Norfolk Southern Ry. Co.	18,988,619	1,661,979	2,081,060	18,569,538	1,307,883	72,500	1,235,383	6.65
9. Seaboard Air Line Ry. Co.	284,170,710	26,273,512	38,619,353	271,824,869	44,704,006	580,925	44,123,081	16.23
10. Southern Railway Co.	553,893,127	39,401,738	56,703,300	536,591,565	92,367,757	2,996,100	89,371,657	16.66
11. Winston-Salem Southbound Ry. Co.	5,989,197	453,422	259,696	6,182,923	620,559	.....	620,559	10.04
Total—11 carriers above	$1,641,392,057	$162,613,682	$214,021,642	$1,549,984,097	$285,458,837	$6,460,748	$278,998,089	18.00%

Sources—1943 Annual Report to the Interstate Commerce Commission.
Column (2)—Schedule 200A—Accounts 701, 702, 702-1/2A, and 702-1/2B-P.200.
Column (3)—Schedule 200A—Accounts 708 and 716-P.200.
Column (4)—Schedule 200L—Accounts 775-1/2, 776, and 776-1/2-P.201.
Column (5)—Column (2) plus Column (3) less Column (4).
Column (6)—Schedule 3001—Line No. 80 plus Line No. 87-P.301A.
Column (7)—Schedule 3001—Line No. 55—Account 542-P.301A.
Column (8)—Column (6) minus Column (7).
Column (9)—Column (8) Divided by Column (5).

[fol. 81]

TABLE II

Revenues, Expenses and Operating Ratios
Class I Railroads Operating in North Carolina
1943

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Carrier	Total Operating			Assigned to Freight Service			Assigned to Passenger Service		
	Revenues	Expenses	Operating Ratio	Revenues	Expenses	Operating Ratio	Revenues	Expenses	Operating Ratio
1. Atlantic Coast Line R. R. Co.	$153,601,015	$81,782,633	53.24%	$103,857,749	$54,285,253	52.27%	$49,743,266	$27,497,380	55.28%
2. Clinchfield R. R. Co.	12,796,775	6,201,834	48.46	12,583,264	5,963,934	47.40	213,511	237,900	111.42
3. Louisville and Nashville R. R. Co.	208,799,302	118,152,434	56.59	154,592,230	90,458,542	58.51	54,207,072	27,693,892	51.09
4. Norfolk Southern Ry. Co.	8,377,575	6,181,654	73.79	7,918,086	5,569,318	70.34	459,489	612,336	133.26
5. Seaboard Air Line Ry. Co.	137,257,803	80,823,710	58.88	89,466,395	55,264,091	61.77	47,791,408	25,559,619	53.48
6. Southern Railway Co.	245,532,051	136,604,153	55.64	176,593,635	102,959,676	58.30	68,938,416	33,644,477	48.80
7. Total All Class I Railroads	766,364,521	429,746,418	56.06	545,011,359	314,500,814	57.71	221,353,162	115,245,604	52.06

Source: 1943 Annual Reports to the Interstate Commerce Commission.
Columns (2), (5), and (8) Schedule 310, p. 303.
Columns (3), (4), (6), (7), (9), and (10) Schedule 320, pp. 312-313.

[fol. 82]

TABLE III

Estimate of Unit Costs Per Coach Passenger-Mile
Class I Railroads Operating in North Carolina
1937-1943

	Carrier	Expenses Assigned to Passenger Service	Passenger Car-Miles	Passenger-Miles in Coaches	Passenger Coach-Miles	Expenses Per Passenger Car-Mile or Per Coach-Mile (Cents) (2)/(3)	Coach Passenger-Miles Per Coach Car-Mile (4)/(5)	Expenses Per Coach Passenger-Mile (Cents) (6)/(7)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1937	1. Atlantic Coast Line	$12,391,040	68,261,183	201,279,614	15,847,773	18.15¢	12.70	1.43¢
	2. Clinchfield	206,197	762,232	3,511,939	408,005	27.05	8.61	3.14
	3. Louisville & Nashville	15,045,666	63,219,808	294,867,671	22,726,968	23.80	12.53	1.90
	4. Norfolk Southern	392,157	1,375,078	5,339,683	792,455	28.52	6.74	4.23
	5. Seaboard Air Line	10,759,112	48,383,349	189,684,100	11,371,856	22.24	16.68	1.33
	6. Southern	18,520,773	84,944,242	344,883,906	27,892,745	21.80	12.36	1.76
	Total	57,314,945	266,945,892	1,029,566,913	79,039,802	21.47	13.03	1.65
1938	1. Atlantic Coast Line	12,051,350	63,819,970	143,458,178	15,319,098	18.88	9.36	2.02
	2. Clinchfield	189,238	727,474	2,210,338	406,000	26.01	5.44	4.78
	3. Louisville & Nashville	14,540,025	61,054,864	184,097,749	20,772,497	23.81	8.86	2.69
	4. Norfolk Southern	315,462	1,131,361	2,190,784	508,324	27.88	4.31	6.47
	5. Seaboard Air Line	10,571,899	45,562,592	129,632,917	10,967,648	23.20	11.82	1.96
	6. Southern	17,056,520	77,959,053	199,576,186	22,211,013	21.88	8.99	2.43
	Total	54,724,494	250,255,314	661,166,152	70,184,580	21.87	9.42	2.32
1939	1. Atlantic Coast Line	12,399,714	65,942,853	196,683,229	16,573,203	18.80	11.87	1.58
	2. Clinchfield	186,686	719,544	2,644,473	408,892	25.95	6.47	4.01
	3. Louisville & Nashville	14,427,913	60,494,322	231,363,635	21,066,363	23.85	10.98	2.17
	4. Norfolk Southern	287,819	998,781	2,049,948	416,311	28.82	4.92	5.86
	5. Seaboard Air Line	11,309,540	49,386,785	228,809,547	12,888,171	22.90	17.75	1.29
	6. Southern	17,267,881	78,902,125	273,930,278	22,236,844	21.89	12.32	1.78
	Total	55,879,553	256,444,410	935,481,110	73,589,784	21.79	12.71	1.71
1940	1. Atlantic Coast Line	13,761,907	71,466,099	293,435,674	19,152,861	19.26	15.32	1.26
	2. Clinchfield	171,677	726,136	2,956,274	407,879	23.64	7.25	3.26
	3. Louisville & Nashville	15,347,728	62,368,021	256,453,201	21,697,518	24.61	11.82	2.08
	4. Norfolk Southern	319,638	968,075	2,221,026	353,596	33.02	6.28	5.26
	5. Seaboard Air Line	12,370,159	52,934,037	317,106,521	14,650,944	23.37	21.64	1.08
	6. Southern	18,096,003	79,798,391	307,338,176	22,003,737	22.68	13.97	1.62
	Total	60,067,112	268,260,759	1,179,510,872	78,266,535	22.39	15.07	1.49
[fol. 83-84]								
1941	1. Atlantic Coast Line	15,494,743	77,578,922	477,708,832	22,673,122	19.97	21.07	.95
	2. Clinchfield	170,377	748,798	3,344,286	410,022	22.75	8.16	2.79
	3. Louisville & Nashville	16,024,767	66,230,540	356,499,273	23,282,987	24.20	15.31	1.58
	4. Norfolk Southern	312,476	989,667	2,915,628	331,368	31.57	8.80	3.59
	5. Seaboard Air Line	14,550,679	61,296,640	452,214,413	17,664,869	23.74	25.60	.93
	6. Southern	19,726,194	88,664,956	489,114,686	26,666,633	22.25	18.34	1.21
	Total	66,279,236	295,509,523	1,781,797,118	91,029,001	22.43	19.57	1.15
1942	1. Atlantic Coast Line	20,093,035	94,949,819	971,980,340	31,353,218	21.16	31.00	.68
	2. Clinchfield	197,411	746,006	5,252,693	427,285	26.46	12.29	2.15
	3. Louisville & Nashville	21,119,018	85,444,354	799,991,335	30,610,537	24.72	26.13	.95
	4. Norfolk Southern	360,687	1,296,556	11,020,561	496,165	27.78	25.86	1.07
	5. Seaboard Air Line	19,766,891	80,987,934	686,132,259	25,727,418	24.42	33.67	.73
	6. Southern	25,863,988	107,060,730	1,188,107,580	36,948,752	24.16	32.16	.75
	Total	87,401,030	370,485,497	3,843,804,718	125,496,375	23.59	30.62	.77
1943	1. Atlantic Coast Line	27,497,380	109,235,852	1,008,094,835	36,757,364	25.17	41.49	.61
	2. Clinchfield	281,999	814,253	7,889,434	499,714	29.23	15.10	1.94

	Carrier	Passenger Service				Cents (2)/(3)	(4)/(5)	(6)/(7)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1937	1. Atlantic Coast Line	$12,391,040	68,261,183	201,279,614	15,847,773	18.15¢	12.70	1.43¢
	2. Clinchfield	206,197	762,232	3,511,939	408,005	27.05	8.61	3.14
	3. Louisville & Nashville	15,045,666	63,219,808	294,867,671	22,726,968	23.80	12.53	1.90
	4. Norfolk Southern	392,157	1,375,078	5,339,683	792,455	28.52	6.74	4.23
	5. Seaboard Air Line	10,759,112	48,383,349	189,684,100	11,371,856	22.24	16.68	1.33
	6. Southern	18,520,773	84,944,242	344,883,906	27,892,745	21.80	12.36	1.76
	Total	57,314,945	266,945,892	1,029,566,913	79,039,802	21.47	13.03	1.65
1938	1. Atlantic Coast Line	12,051,350	63,819,970	143,458,178	15,319,098	18.88	9.36	2.02
	2. Clinchfield	189,238	727,474	2,210,338	406,000	26.01	5.44	4.78
	3. Louisville & Nashville	14,540,025	61,054,864	184,097,749	20,772,497	23.81	8.86	2.69
	4. Norfolk Southern	315,462	1,131,361	2,190,784	508,324	27.88	4.31	6.47
	5. Seaboard Air Line	10,571,899	45,562,592	129,632,917	10,967,648	23.20	11.82	1.96
	6. Southern	17,056,520	77,959,053	199,576,186	22,211,013	21.88	8.99	2.43
	Total	54,724,494	250,255,314	661,166,152	70,184,580	21.87	9.42	2.32
1939	1. Atlantic Coast Line	12,399,714	65,942,853	196,683,229	16,573,203	18.80	11.87	1.58
	2. Clinchfield	186,686	719,544	2,644,473	408,892	25.95	6.47	4.01
	3. Louisville & Nashville	14,427,913	60,494,322	231,363,635	21,066,363	23.85	10.98	2.17
	4. Norfolk Southern	287,819	998,781	2,049,948	416,311	28.82	4.92	5.86
	5. Seaboard Air Line	11,309,540	49,386,785	228,809,547	12,888,171	22.90	17.75	1.29
	6. Southern	17,267,881	78,902,125	273,930,278	22,236,844	21.89	12.32	1.78
	Total	55,879,553	256,444,410	935,481,110	73,589,784	21.79	12.71	1.71
1940	1. Atlantic Coast Line	13,761,907	71,466,099	293,435,674	19,152,861	19.26	15.32	1.26
	2. Clinchfield	171,677	726,136	2,956,274	407,879	23.64	7.25	3.26
	3. Louisville & Nashville	15,347,728	62,368,021	256,453,201	21,697,518	24.61	11.82	2.08
	4. Norfolk Southern	319,638	968,075	2,221,026	353,596	33.02	6.28	5.26
	5. Seaboard Air Line	12,370,159	52,934,037	317,106,521	14,650,944	23.37	21.64	1.08
	6. Southern	18,096,003	79,798,391	307,338,176	22,003,737	22.68	13.97	1.62
	Total	60,067,112	268,260,759	1,179,510,872	78,266,535	22.39	15.07	1.49
[fol. 83–84]								
1941	1. Atlantic Coast Line	15,494,743	77,578,922	477,708,832	22,673,122	19.97	21.07	.95
	2. Clinchfield	170,377	748,798	3,344,286	410,022	22.75	8.16	2.79
	3. Louisville & Nashville	16,024,767	66,230,540	356,499,273	23,282,987	24.20	15.31	1.58
	4. Norfolk Southern	312,476	989,667	2,915,628	331,368	31.57	8.80	3.59
	5. Seaboard Air Line	14,550,679	61,296,640	452,214,413	17,664,869	23.74	25.60	.93
	6. Southern	19,726,194	88,664,956	489,114,686	26,666,633	22.25	18.34	1.21
	Total	66,279,236	295,509,523	1,781,797,118	91,029,001	22.43	19.57	1.15
1942	1. Atlantic Coast Line	20,093,035	94,949,819	971,960,340	31,353,218	21.16	31.00	.68
	2. Clinchfield	197,411	748,096	5,253,683	427,285	26.46	12.29	2.15
	3. Louisville & Nashville	21,119,018	85,444,354	709,991,236	30,610,537	24.72	26.13	.95
	4. Norfolk Southern	380,687	1,298,556	11,020,561	436,165	27.78	25.86	1.07
	5. Seaboard Air Line	19,706,291	80,937,994	686,183,259	25,727,418	24.42	33.67	.73
	6. Southern	25,963,986	107,069,729	1,186,107,580	36,948,752	24.16	32.16	.75
	Total	87,491,080	370,445,497	3,842,894,718	125,493,375	23.59	30.62	.77
1943	1. Atlantic Coast Line	27,497,380	109,226,883	1,908,094,835	36,767,364	25.17	41.49	.61
	2. Clinchfield	287,020	844,253	7,388,454	489,714	33.99	15.10	1.94
	3. Louisville & Nashville	27,086,883	109,430,705	1,800,542,707	39,237,465	27.59	45.90	.60
	4. Norfolk Southern	613,236	1,371,893	14,086,816	534,430	44.64	26.36	1.69
	5. Seaboard Air Line	25,550,619	92,520,974	1,467,183,154	32,986,202	27.62	45.11	.61
	6. Southern	33,644,477	120,411,468	1,916,816,436	47,278,288	27.94	40.54	.69
	Total	115,245,604	434,786,985	6,834,075,392	159,253,563	27.13	42.91	.63

Sources: Annual Report to the Interstate Commerce Commission, for each carrier indicated for the years 1937 through 1943; and Form APT, Analysis of Passenger Traffic, for each carrier named, for the month of December of the years 1937 through 1943.

Col. (2)—Annual Reports, p. 311 in 1937 and p. 313 for 1938 through 1943.
Col. (3)—Annual Reports, p. 508, col. D, lines 42, 43, 44, 45, 46, 47.
Col. (4)—Form APT, Analysis of Passenger Traffic.
Col. (5)—Annual Reports, p. 508, Col. D, Line 42 plus 50% of Line 47.
Col. (6)—Col. (2) Divided by Col. (3).
Col. (7)—Col. (4) Divided by Col. (5).
Col. (8)—Col. (6) Divided by Col. (7).

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 24, 1944

The defendant Interstate Commerce Commission, hereinafter called the Commission, in answer to the petition of the State of North Carolina and the North Carolina Utilities Commission, respectfully states:

1. The Commission admits for the purposes of this suit the allegations contained in paragraphs 100 to 119 both inclusive.

2. (a) Further answering said paragraphs the Commission admits and alleges: It made the report dated March 25, 1944, and the order dated May 8, 1944, as corrected May 24, 1944 (the order sought to be set aside in this action). Said report and order were made in a proceeding entitled No. 29036, *North Carolina Intrastate Coach Fares,* which involved the question whether the North Carolina intrastate fares for passengers in coaches lower than the interstate coach fares from, to and between points in North Carolina, were violative of section 13(3) and (4) of the Interstate Commerce Act (49 U. S. C., sec. 13(3) and (4)), which forbids and declares to be unlawful any "rate, fare, charge, classification, regulation, or practice" which "causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce."

(b) Said proceeding was instituted by the Commission by order dated October 13, 1943, in response to a petition dated July 22, 1943, filed under the authority of section 13(3) of said Act, by certain common carriers by railroad engaged in the transportation of persons and property in interstate commerce to, from and between points in the State of North Carolina and also in the transportation of persons and property in intrastate commerce between points in North Carolina. Said petition alleged *inter alia* that the

basic coach fares applicable on interstate traffic throughout southern territory (east of the Mississippi and south of the Ohio and Potomac rivers) and generally on inter- [fol. 86] state traffic throughout the United States was then 2.2 cents per mile, having been established pursuant to the authority of orders of the Commission in Ex Parte 148, *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, in which the Commission found that passenger fares in coaches increased 10 percent from 2 to 2.2 cents per mile on interstate traffic throughout the country were just and reasonable; that the intrastate coach fare then generally in effect in North Carolina was 1.65 cents per mile; that petitioners had applied to the North Carolina Utilities Commission (hereinafter called the North Carolina Commission) for authority to increase the North Carolina intrastate coach fare to the level of the interstate coach fare then generally in effect throughout the United States and that such authority had been denied; and that this denial of such authority by the North Carolina Commission caused violations of section 13(3) and (4) of the Interstate Commerce Act.

(c) The Commission's order of investigation of October 13, 1943, named the petitioning railroads and all other common carriers by railroad operating within the State of North Carolina subject to the jurisdiction of the Commission as respondents, and ordered that a hearing be held for the purpose of receiving evidence to determine whether the disparity between the interstate and intrastate coach fares caused any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand or any undue, unreasonable or unjust discrimination against interstate commerce; and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges should be prescribed to remove such unlawful advantage, preference, prejudice or discrimination, if any, as might be found to exist.

(d) After due notice a hearing was held at Raleigh, N. C., on December 28 and 29, 1943 at which the interested carriers (hereinafter called respondents), the North Carolina Commission, the Price Administrator, and certain

other parties, by their respective counsel, appeared and participated. Substantial evidence was introduced, the testimony filling 243 typewritten pages supplemented by 21 documentary exhibits. Thereafter briefs were filed by the several parties and on February 18, 1944 the issues were orally argued before the Commission at Washington, D. C.

(e) On March 25, 1944 the Commission issued its report which embraced also three other similar cases, viz., No. 28963, *Alabama Intrastate Fares*, No. 29000, *Kentucky Intrastate Fares* and No. 29037, *Tennessee Intrastate Fares*. Said report appears under the title *Alabama Intrastate Fares*, 258 I. C. C. 133, an officially printed copy of which is attached hereto, marked Exhibit No. 1.

(f) In said report the Commission found that the interstate coach fare of 2.2 cents in effect to, from and through points in North Carolina is just and reasonable; that the intrastate coach fare in North Carolina of 1.65 cents is lower than the corresponding fare of 2.2 cents applicable interstate generally throughout southern territory and also generally throughout the United States; that the regulatory authorities of Florida, Georgia, Louisiana, Mississippi, Virginia and South Carolina had approved increases in the intrastate coach fares in those States from 1.65 cents to the interstate level of 2.2 cents, and that the 2.2-cent [fol. 87] fare was in effect on intrastate traffic generally throughout southern territory except intrastate in North Carolina, Alabama, Tennessee and Kentucky; that the conditions affecting the transportation of passengers in coaches within these four States intrastate on the one hand and interstate to, from and through those respective States on the other, are substantially similar; that interstate passengers in those States travel in the same trains and generally in the same cars with intrastate passengers but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers; that the revenues of the respondents under the lower intrastate fares are less by at least $525,000 per annum in North Carolina (and $725,000 per annum in Alabama, $500,000 per annum in Kentucky and $525,000 per annum in Tennessee) than they would be if those fares were increased to the level of the corresponding interstate

fares, and that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service; that the maintenance of intrastate coach fares in North Carolina (and Alabama, Kentucky and Tennessee) to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce (in violation of said section 13(4)); and that this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from and through such States.

(g) The foregoing findings were "without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act."

(h) The Commission did not immediately issue an order in connection with said report. In accordance with its practice in such proceedings, it left to respondents and the respective State commissions the matter of adjusting the intrastate fares to conform to said findings, but stated that if this were not accomplished within 30 days from the service of the report, consideration would be given to the entry of an appropriate order.

(i) On April 27, 1944 the North Carolina Commission filed a petition for further hearing, reargument and reconsideration of the Commission's report of March 25, 1944. On April 26, 1944 the Price Administrator filed a petition for reconsideration. On May 5, 1944 the respondents filed a reply to said petitions. By order dated May 8, 1944 the Commission denied said petitions.

(j) On May 1, 1944 the respondents filed a motion averring that the North Carolina Commission had failed to

authorize respondents to adjust the intrastate fares to conform to the findings contained in the report of March 25, 1944 and moving that the Commission enter an appropriate order.

[fol. 88] (k) On May 8, 1944 the Commission issued the order hereinbefore referred to. As corrected on May 24, 1944 it requires that respondents shall establish on or before July 1, 1944 (later extended to August 1, 1944) and thereafter maintain and apply passenger fares for intrastate transportation in North Carolina (and in Alabama, Kentucky and Tennessee) which shall be on bases no lower than the passenger fares presently maintained and applied by the respective respondents for like accommodations in interstate transportation to, from and through the respective States; provided that the resulting aggregate charge made by any of said respondents for intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondents in interstate transportation to, from or through such States.

3. Answering paragraphs 120, 121 and 122, the Commission admits the allegations thereof to the extent they are consistent with the findings of fact in the aforesaid report of March 25, 1944, but the Commission alleges that said paragraphs do not set forth a full, accurate and complete history of the one-way coach fares in the South. In this connection the Commission respectfully refers to the report of March 25, 1944, which, on pages 134-136, gives a brief but comprehensive history of said fares; and to its report of February 28, 1936 in *Passenger Fares and Surcharges*, 214 I. C. I. 174. The Commission further respectfully refers to its report of March 2, 1942 in *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545, especially pages 564-566 and 606-613; to its report of April 6, 1943 on further hearing in the last-cited case, 255 I. C. C. 357, and especially pages 385-388, 394 and 395; and to its subsequent reports in that case, 256 I. C. C. 502, decided November 8, 1943, and — I. C. C. —, decided May 12, 1944, in all of which it considered the revenue needs of the interstate rail carriers of the United States.

4. The Commission admits the allegations of paragraphs 123 to 130 both inclusive.

5. Answering paragraphs 131 and 132, the Commission admits that its examiner ruled that reply briefs would not be permitted, alleges that no complaint was made to it because of such ruling, alleges that oral argument was subsequently held, in which the parties had full opportunity to reply to each other's arguments in brief and orally, said oral arguments having been held before the Commission at Washington, D. C., February 18, 1944.

6. Answering paragraphs 133 to 136 both inclusive, the Commission admits the allegations of paragraphs 133, 134, 135 and 136, and admits that paragraphs 133.1 to 133.6 both inclusive summarize some of the findings in the report of March 25, 1944, but the Commission respectfully refers the Court to the report itself for full, complete and accurate information as to its contents.

7. The Commission denies the allegations of paragraph 137.

8. Answering paragraphs 138 and 139, the Commission admits the filing of the petition by the North Carolina Commission asking, among other things, for rehearing, as alleged in paragraph 138 (see paragraph 2(i), *supra*), but denies the alleged errors specified in paragraph 139.

[fol. 89] 9. The Commission admits the allegations of paragraphs 140, 141 and 141.1.

10. Answering paragraph 142, the Commission admits that the North Carolina Commission pursued its administrative remedies before the Commission to the extent of filing a petition for rehearing and reconsideration before instituting the action before this Court.

11. The Commission denies the allegations of paragraph 143.

12. Answering paragraph 144, the Commission denies that it committed error in the respects alleged in said paragraph; and in this connection the Commission respectfully calls the Court's attention to the following findings in its report of March 25, 1944 (pp. 145, 150):

> "By petition filed October 12, 1942, with the North Carolina Utilities Commission, the several railroads operating in North Carolina, with the exception of the Norfolk & Western, sought authority to increase the

intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars in that State to the level of the interstate fares. The intrastate one-way and round-trip coach fares of the Norfolk & Western, which has about 100 miles of railroad in North Carolina, are the same as the interstate fares. The North Carolina Commission, by report and order of July 8, 1943, approved the proposed changes in the round-trip fares in sleeping and parlor cars, but deferred decision on the proposal to increase the fares in coaches pending further administrative action by it. As a result of that order, the present intrastate one-way coach fares in North Carolina are 1.65 cents a mile; and the intrastate round-trip coach fares in that State are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days."

"*North Carolina.*—In its brief and upon oral argument the North Carolina Commission contends that respondents in No. 29036 erred as a matter of law, in that they failed to exhaust their remedies before that Commission prior to filing their section 13 petition with us, on the ground that its order was interlocutory in form and was so issued in order that it might file with us the petition before mentioned for investigation of the interstate coach fares. It asserts that the matter was and still is open for consideraion by it. The instant proceeding was not instituted until after we had fully considered the petition of the North Carolina Commission and had denied that petition. In view of this fact, and of the time which has elapsed since respondents petitioned that Commission on October 12, 1942, for authority to increase the intrastate coach fares in that State, we do not believe that we would be justified in deferring action in this proceeding and requiring respondents to renew their efforts before that Commission for authority to increase these fares. Moreover, the issues presented for our consideration here differ in important respects from those which are within the jurisdiction of that Commission, and our duty under the Interstate Commerce Act, as we see it, is to decide these issues on the record now before us."

[fol. 90] 13. The Commission denies the allegations of paragraph 145.

14. Answering paragraph 145.1, the Commission admits and alleges: The North Carolina Commission by petition dated July 8, 1943, the Alabama Public Service Commission by petition dated August 27, 1943 and the Price Administrator by petition dated July 31, 1943, requested the Commission to make a further investigation of the reasonableness of the interstate coach fares in southern territory. Although the interstate coach fares in southern territory were then at the 2.2-cent level, and this level prevailed throughout the rest of the country on interstate traffic, these petitions made no request for a general investigation of the reasonableness of the interstate coach fares throughout the country, but were restricted to southern territory. A reply was filed by the southern territory carriers dated August 9, 1943 uging, among other things, that there was no need for a general investigation of the reasonableness of the interstate coach fares in effect throughout southern territory, as the Commission had recently investigated the level of such interstate fares and had specifically approved them for general application throughout the United States. The Commission gave careful consideration to said petitions and the reply thereto and by letter dated October 13, 1943 advised the parties that on October 11, 1943 it had voted to deny the petitions.

15. Answering paragraph 145.2, the Commission denies that any action of its examiner at the hearing in No. 29036 precluded the production of any evidence by the North Carolina Commission or any other party bearing on the reasonableness of the interstate fares; and alleges that the examiner did not refuse to receive any evidence proffered by the protestants at said hearing, that no objection to the examiner's alleged ruling was voiced by the North Carolina Commission or any other party, and that no objection to the alleged ruling was made in the brief of any party.

16. For answer to paragraph 145.3, the Commission respectfully refers to paragraph 5, *supra*.

17. Answering paragraph 145.4 and further answering paragraphs 145, 145.1, 145.2 and 145.3, the Commission alleges that in the aforesaid proceeding the parties thereto, including the North Carolina Commission, were accorded the

full hearing provided for in and by the Interstate Commerce Act, and the Commission denies each of and all the allegations to the contrary contained in said petition.

18. Answering paragraph 146, the Commission denies that it erred in finding that the interstate coach fares are just and reasonable, and denies that its examiner ruled that the interstate coach fares were not in issue.

19. (a) Answering paragraph 147, the Commission denies the allegations thereof, and denies that said paragraph fully and accurately states the holdings made in 1936 in *Passenger Fares and Surcharges*, 214 I. C. C. 174. That proceeding was a nation-wide investigation into the passenger fares and charges maintained by all common carriers by railroad subject to the Interstate Commerce Act. The report finds that the basic fare prior to World War I was not uniform throughout the country, but averaged about 2.5 cents per mile. By order of the Director General of Railroads the basic fare became uniform with few exceptions at 3 cents, beginning in 1918. In 1920 it was increased 20 percent to 3.6 cents as authorized by the Commission in *Increased Rates 1920*, 58 I. C. C. 220. In the latter proceeding the Commission also authorized the establishment of [fol. 91] a 50 percent surcharge on passengers in Pullman cars. (214 I. C. C., p. 186.) The latter basis remained in effect generally throughout the country until about 1933 when many of the carriers in the South and the West put into effect experimental fares of 1.5 cents per mile in an effort to regain some of the passenger traffic which they had lost through the competition of buses and the use of private automobiles, as fully explained in *Passanger Fares and Surcharges, supra.* (See 214 I. C. C., pp. 188-201 regarding the southern district, and pp. 201-206 regarding the western district.) The 1920 basis remained in effect in the East until 1936. In the last-cited report the Commission reduced the 3.6-cent fare to 3 cents in Pullmans and 2 cents in coaches, and eliminated the surcharge, predicated upon a finding that the regular passenger fare structure of the rail carriers throughout the country was and for the future would be unreasonable to the extent that it exceeded or might exceed fares of 3 cents in Pullmans and 2 cents in coaches without prejudice to the maintenance of lower fares in any major district of the country. (214 I. C. C.

p. 256.) The Commission also there found the then-existing experimental fares in the southern and western districts were not unreasonable or otherwise unlawful. (214 I. C. C., p. 257.) The Commission alleges, as shown by the last-cited reports, that said experimental fares of 1.5 cents per mile in southern territory were voluntarily established by the carriers and were not prescribed by the Commission; that said report, while finding that a coach fare of 2 cents would be a reasonable fare for all interstate rail carriers, did not condemn the lower experimental fares of 1.5 cents in the southern and western districts, and, though said voluntarily established fares were lower than the fare found reasonable by the Commission for general application throughout the country, did not require those fares to be increased. The Commission respectfully calls attention to its finding in the report of March 25, 1944, pp. 134 and 135, that "The 1.5-cent fare in effect from December 1, 1933 to November 14, 1937 and from January 15, 1939 to February 9, 1942 [in southern territory] was a subnormal fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles." (*Ib.*, p. 137.)

(b) Answering the allegations of said paragraph 147 respecting the burden of proof in No. 29036, the Commission alleges that the respondent rail carriers assumed the burden of proving, as alleged in their petition, that the North Carolina intrastate coach fares cause undue preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and undue, unreasonable or unjust discrimination against interstate commerce; that said respondents presented substantial evidence directed to such a showing, and thereupon the protestants presented their evidence in opposition to such allegations; and the Commission, after considering all the evidence, made its aforesaid report and decision. The Commission denies that it committed any error in this regard.

20. The Commission denies the allegations of paragraph 148 to 155 both inclusive.

21. Answering paragraph 156, the Commission denies the allegations thereof; and the Commission respectfully objects to the receipt as evidence of the affidavit referred to therein

and attached to the petition as "Appendix No. 156.1," on the ground that said affidavit contains new matter not introduced in evidence in the proceeding before the Commission, is tendered as evidence *de novo* and is inadmissible before [fol. 92] the Court in this suit. The Commission respectfully moves that said affidavit be stricken from the petition.

22. The Commission denies the allegations of paragraphs 157 to 165 both inclusive.

23. Answering paragraph 166, the Commission denies that its action was arbitrary for the reason stated therein and respectfully calls attention to the fact that it is authorized by the provisions of section 13(4) of the Interstate Commerce Act, upon the petition of the carriers concerned, whenever it finds after full hearing in any investigation instituted under section 13(3) that any fare made or imposed by authority of any State causes the prejudice or discrimination there forbidden, to prescribe such fare to be charged thereafter as in its judgment will remove such prejudice or discrimination; and that therefore no petition or complaint by any other person, firm, corporation or association is legally necessary.

24. Answering paragraph 167, the Commission denies that it erred for the reasons stated in said paragraph; and in this connection the Commission respectfully refers to its answer in paragraph 23 whereof to paragraph 166 of the petition.

25. Answering paragraph 168, the Commission denies that it erred in the respect alleged in reaching the conclusion that the North Carolina intrastate coach fares lower than the corresponding interstate coach fares caused undue preference of intrastate passengers.

26. The Commission denies the allegations of paragraphs 169, 170 and 171. Further answering paragraph 171, the Commission alleges that any claim or disclaim of the railroad petitioners in the proceeding before the North Carolina Commission is here immaterial and irrelevant.

27. Answering paragraph 172, the Commission denies that it erred in making said finding No. 6, denies that said finding has the meaning ascribed to it in said paragraph 172, and denies the allegations of fact in said paragraph.

28. The Commission denies the allegations of paragraph 173.

29. The Commission denies the allegations of paragraphs 174 to 180 both inclusive and denies that it erred for any of the reasons alleged in said paragraphs.

30. Answering paragraph 181, the Commission calls attention to the fact that said paragraph does not contain any allegations of fact and deals entirely with questions of law determinable by reference to the provisions of the Interstate Commerce Act and pertinent decisions of the federal courts, particularly the Supreme Court of the United States, and in this connection the Commission respectfully invites attention to the decision of the Supreme Court in *Florida* v. *United States*, 292 U. S. 1, 12; and the Commission alleges that under said decision and other pertinent decisions, petitioners are not entitled to a trial *de novo* in a case of this kind.

[fol. 93] 31. (a) Further answering the petition, the Commission alleges that in the aforesaid proceeding the parties thereto, including North Carolina Commission, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing substantial evidence bearing upon the issues was submitted, that in briefs and in oral argument questions relating to the issues were fully argued and submitted for determination, and the Commission determined said matters and entered and served upon the parties its aforesaid report; that said report and said order include the Commission's findings of fact, decisions and conclusions, and that upon the evidence aforesaid the Commission made the findings and stated the conclusions upon which said report and order are based.

(b) The Commission further alleges that the findings and conclusions in said report are fully supported by the evidence, that in making said report it considered and weighed carefully each fact, circumstance and condition called to its attention on behalf of the parties by their respective counsel, that said order was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it, that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies

each of and all the allegations to the contrary contained in said petition.

(c) Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition insofar as they conflict either with the allegations herein or with the statements, findings, determinations or conclusions of fact contained in the aforesaid report of March 25, 1944. The Commission respectfully refers the Court to said report for full, complete and accurate information concerning the contents thereof, which said report is hereby incorporated by reference and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 94] *Duly sworn to by Claude R. Porter. Jurat omitted in printing.*

[fol. 95] EXHIBIT NO. 1 TO ANSWER

24362

Interstate Commerce Commission

No. 28963[1]

Alabama Intrastate Fares

Submitted February 18, 1944. Decided March 25, 1944

Intrastate Passenger Fares in Alabama, Kentucky, North Carolina, and Tennessee, where Lower than the Corresponding Interstate Fares, Found to Cause Undue Advantage, Preference, and Prejudices as between Persons in Intrastate Commerce on the One Hand and Interstate

[1] This report also embraces No. 29000, Kentucky Intrastate Fares; No. 29036, North Carolina Intrastate Coach Fares; and No. 29037, Tennessee Intrastate Fares.

Commerce on the Other, and Unjust Discrimination against Interstate Commerce.

William C. Burger, Charles Clark, Joseph P. Cook, James B. Gray, Frank W. Gwathmey, Y. D. Lott, Jr., Edward D. Mohr, W. A. Northcutt, L. L. Oliver, and *Charles P. Reynolds* for respondents.

Hugh White, W. C. Harrison, Gordon Persons, J. G. Bruce, and *Norwood Johnson* for Alabama Public Service Commission; *Hubert Meredith* and *M. B. Holifield* for Commonwealth of Kentucky; *Frank L. McCarthy, Jack E. Fisher, Mrs. John W. Langley,* and *J. E. Marks* for Railroad Commission of Kentucky; *Stanley Winborne, Fred C. Hunter, R. G. Johnson, F. C. Hillyer,* and *H. M. Nicholson* for North Carolina Utilities Commission; and *Leon Jourolman, Jr.,* and *J. O. Hendley* for Railroad and Public Utilities Commission of Tennessee.

M. D. Miller, George J. Burke, David F. Cravers, Warren Price, Jr., Richard H. Field, and *Bernard M. Fitzgerald* for Price Administrator and Economic Stabilization Director.

James E. Burkett, W. R. McDonald, Crawford L. Pilcher, A. J. Young, Frank L. McCarthy, J. E. Marks, W. H. Amerine, F. C. Hillyer, and *Henry M. Johnson* for other interveners.

Report of the Commission

By the COMMISSION:

These proceedings were heard and briefed separately, but were orally argued together. They embody similar issues, upon which the evidence adduced in the respective proceedings is substantially similar, and will be disposed of in one report.

They are investigations instituted upon petitions by the rail carriers operating, respectively, in Alabama, Kentucky, North Carolina, and Tennessee, to determine whether the refusal of the regulatory authority of those States to authorize or permit the application to the transportation of [fol. 96] passengers traveling intrastate therein of fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other,

or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges, should be prescribed to remove such advantage, preference, prejudice, or discrimination, if any, as might be found to exist. All common carriers by railroad operating within Alabama, Kentucky, North Carolina, and Tennessee subject to our jurisdiction were made respondents, and those States were notified of these proceedings.

The regulatory commissions of the respective States intervened each in the proceeding wherein lies its chief interest; the Price Administrator in behalf of himself and the Director of Economic Stabilization intervened in all of the proceedings; and several other persons or associations of persons or corporations appeared in one or more of the proceedings to protest against any increase in fare.

History of rail fares.—In southern passenger association territory, hereinafter referred to as southern territory, which, generally speaking, is that territory east of the Mississippi River and south of the Ohio and Potomac Rivers, the basis of one-way fares from April 1, 1908, to June 9, 1918, was generally 2.5 cents per mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, the fare was increased to 3 cents per mile in all classes of equipment. This fare remained in effect until August 25, 1920, but during the period June 10 to November 30, 1918, an additional charge of 16⅔ per cent of the one-way fare was assessed for travel in sleeping and parlor cars. From August 26, 1920, to November 30, 1933, the fare generally was 3.6 cents per mile in all classes of equipment, plus a surcharge on transportation in sleeping and parlor cars on and after December 1, 1918, of 50 per cent of the charge made for space occupied in such cars.

During 1932 and 1933, certain of the carriers operating in southern territory experimented with fares lower than 3.6 cents in attempts to attract additional passenger business in competition with transportation by private automobiles and in busses. For example, from April 1 to November 30, 1933, experimental one-way fares of 3 cents per mile in sleeping or parlor cars, without a surcharge, and 2 cents per mile in coaches, were maintained by the Atlanta and West Point Rail Road Company, the Western Railway of

Alabama, Mobile and Ohio Rail Road Company (now part of the Gulf, Mobile and Ohio Railroad Company), Louisville [fol. 97] and Nashville Railroad Company, and The Nashville, Chattanooga & St. Louis Railway. During the same period the Southern Railroad system lines were experimenting with coach fares of 1.5 cents per mile on certain portions of their lines.

On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5-cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and the St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees).

In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or pullman cars. The pullman surcharge was found unreasonable and its cancellation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful.

On November 15, 1937, the carriers which had been maintaining the experimental coach fare of 1.5 cents increased that fare to 2 cents per mile, but restored the 1.5-cent fare on January 15, 1939. Again, certain of the southern lines, including the Illinois Central, Mobile & Ohio, St. Louis-San Fransisco, and Norfolk and Western Railway Company, retained the 2-cent fare basis.

By order of January 21, 1942, in Ex Parte No. 148, we found that a Nation-wide increase of 10 percent in fares proposed by the railroads was necessary to enable the petitioners to continue to render adequate and efficient transportation service during the national emergency, and

that the proposed increased fares would be reasonable and otherwise lawful. See *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 565, 566, where the foregoing findings were renewed and affirmed.

The reestablished coach fares of 1.5 cents remained in effect until February 10, 1942, on which date the 10 percent increase in fares for transportation in both coaches and pullman cars became effective. On that date fares of 1.5 cents became 1.65 cents; fares of 2 cents became 2.2 cents; and fares of 3 cents became 3.3 cents. The round-trip fares were modified to reflect the increase in the one-way [fol. 98] fares. On various subsequent dates these increased fares also became effective on intrastate traffic in all of the States.

On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. Having found in *Passenger Fares and Surcharges, supra*, that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners, we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority, one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic. Effective on the same date the railroads generally throughout southern territory, published a uniform basis of interstate round-trip fares to displace the round-trip fares theretofore in effect, namely, in coaches on the basis of 180 percent of the one-way fare of 2.2 cents, or 1.98 cents a mile, with a return limit of 3 months; and in sleeping and parlor cars on the basis of 166⅔ percent of the one-way fare of 3.3 cents in such cars, or 2.75 cents a mile, with a return limit of 3 months. The increased fares proposed for application in southern territory were protested and suspension of their operations was requested by the Price Administrator, but we declined to suspend. The fares so increased are now in effect on interstate traffic.

Thereafter, with the approval of the rate regulatory authorities of those States, the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars were increased to the respective levels of the corresponding interstate fares in Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina, and the round-trip fares in sleeping and parlor cars were increased to the level of the interstate fares in such cars in North Carolina and Kentucky. The rate regulatory authorities of Alabama, North Carolina, Tennessee, and Kentucky have declined to authorize the increases sought by the railroads in one-way and round-trip coach fares in those States, and the rate regulatory authorities of Alabama and Tennessee have also refused to authorize the increases in the round-trip fares in sleeping and parlor cars. It is those fares in the four States last named which are here under investigation.

As a basis for a finding of violation of section 13 (4) of the act, the interstate fares must be shown to be reason-
[fol. 99] able. *Georgia Public Service Comm.* v. *United States*, 283 U. S. 765; *United States* v. *Louisiana*, 290 U. S. 70. Therefore, before proceeding to a consideration of the evidence submitted in the respective proceedings bearing directly upon the issues under section 13 (4), we shall first consider the evidence bearing upon the reasonableness of the interstate fares.

Level of the Interstate Fares

Comparing the interstate one-way coach fare of 2.2 cents with basic fares in effect at various times during the period from April 1, 1908, to November 30, 1933, it will be seen that the fares in effect from April 1, 1908, to June 9, 1918, were 13.6 percent higher than the present fares; those in effect June 10, 1918, to August 25, 1920, were 36.4 percent higher; and those in effect August 26, 1920, to November 30, 1933, were 63.6 percent higher. The 1.5-cent fare in effect from December 1, 1933, to November 14, 1937, and from January 15, 1939, to February 9, 1942, was subnormal fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles.

When in *Passenger Fares and Surcharges, supra*, in 1936, we reduced the basic interstate coach fares throughout the nation from 3.6 to 2 cents, we gave consideration to

the element of what the traffic will bear in the light of the competition from private automobiles (page 231), and in our summary of fact findings said (page 255):

9. Changed economic conditions, including reduced commodity prices and average income, together with the generally cheaper cost and greater convenience of travel by highway, have so affected the value of the rail passenger service to the public that a fare basis which was a reasonable maximum before severe highway competition, and especially before the fall in recent years in commodity prices and average income, is out of harmony with present-day conditions.

Economic conditions since then have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage unnecessary travel, and are cooperating with the Office of Defense Transportation in its effort to avoid the rationing of passenger travel. As hereinabove mentioned, in our order of January 21, 1942, we found that the increased fares would be reasonable, and affirmed that finding in our report of March 2, 1942. In a report on further hearing, 255 I. C. C. 357, decided April 6, 1943, wherein we suspended the operation of the increases that had been authorized on freight rates, we declined to suspend their operation on passenger fares. We there found, at pages 394-5:

Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel [fol. 100] except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel.

We found, further, that passenger traffic had failed for many years to pay its proper share of railway expenses, and that only with a large volume of passenger traffic was the 1942 passenger deficit currently eliminated as to most of the railroads. Respondents herein presented statistics of their revenues, expenses, and income, together with other data, designed to support that finding as to them.

The aggregate net railway operating income or deficit from passenger operations of the five principal respondents in No. 29036 for recent years was as follows:

1936, deficit	$10,997,768
1937, deficit	10,231,812
1938, deficit	12,916,499
1939, deficit	12,464,628
1940, deficit	12,548,190
1941, deficit	3,436,130
1942, income	24,630,302
Average, deficit	5,423,532

Two of these respondents [2] had a deficit from passenger operations in 1942. The freight and passenger operating ratios, respectively, of 6 of the respondents in that proceeding averaged as follows: 1936, 65 and 120; 1937, 67 and 117; 1938, 67 and 125; 1939, 64 and 124; 1940, 64 and 123; 1941, 60 and 101; and 1942, 55 and 63.

The passenger operating revenues of the five principal respondents in that proceeding during the 12 months ended October 31, 1943, were substantially greater than those for the year 1942. As estimated by witness for the Price Administrator, the passenger operating ratio of those respondents and of respondents Louisville & Nashville and Norfolk and Western Railway Company for the first 9 months of 1943, unlike that for 1942, was somewhat more favorable than the freight operating ratio of these roads for the same period. That protestant also submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before Federal income taxes more than a fair return on various book investment bases computed by his witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce.

[fol. 101] The net railway operating income from passenger operations of the 12 principal respondents in No. 28963 is shown below:

1936, deficit	$30,134,958
1937, deficit	27,420,877

[2] Carolina, Clinchfield and Ohio Railway, $84,999; Norfolk Southern Railway Company, $134,600.

1938, deficit	32,463,299
1939, deficit	31,758,549
1940, deficit	32,933,304
1941, deficit	19,426,424
1942, income	31,566,377
Average, deficit	20,341,576

Two of these respondents [3] had a deficit in 1942. The freight and passenger operating ratios, respectively, of these 12 respondents averaged as follows: 1936, 67 and 126; 1937, 69 and 121; 1938, 68 and 128; 1939, 66 and 128; 1940, 67 and 127; 1941, 62 and 107; and 1942, 58 and 68. The passenger operating ratio of 1943 was lower than for 1942.

The aggregate net railway operating income from passenger operations of the seven principal respondents in No. 29000 was as follows:

1936, deficit	$22,763,721
1937, deficit	21,078,023
1938, deficit	24,220,376
1939, deficit	24,189,043
1940, deficit	25,748,961
1941, deficit	18,387,738
1942, income [1]	11,118,537
Average, deficit	17,895,617

The freight and passenger operating ratios, respectively, of these respondents averaged as follows: 1936, 59 and 128; 1937, 63 and 130; 1938, 62 and 131; 1939, 61 and 132; 1940, 60 and 136; 1941, 57 and 115; and 1942, 56 and 74.

The aggregate net railway operating income from passenger operations of the eight principal respondents in No. 29037 appears below:

1936, deficit	$19,290,859
1937, deficit	17,838,577
1938, deficit	19,566,771

[3] Atlanta, Birmingham and Coast Railroad Company, $345,762; Gulf, Mobile & Ohio, $592,468.

[1] Respondents' exhibit shows a deficit for the Chesapeake & Ohio Railway Company of $1,562,533. However, the annual report of that respondent to this Commission shows a profit of $434,381.

1939, deficit	19,972,298
1940, deficit	21,587,906
1941, deficit	14,225,973
1942, income	11,802,470
Average, deficit	14,239,972

[fol. 102] Four of these respondents[4] had a deficit in 1942. The freight and passenger operating ratios, respectively, of eleven of the respondents in No. 29037 averaged as follows: 1936, 65 and 129; 1937, 68 and 124; 1938, 66 and 131; 1939, 65 and 132; 1940, 64 and 133; 1941, 60 and 111; and 1942, 58 and 72.

The passenger coach revenues of all class I railroads in the southern region[5] for the first 7 months of 1943 were substantially in excess of those for the corresponding months of 1942 and 1941, and the increases in the revenues from coach traffic were greater than the increases during the same period in the revenues of these railroads from sleeping and parlor car fares. So, also for the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument, the increase in the passenger coach revenues of these carriers over those for the corresponding period of 1942 was 128.5 percent, as compared with an increase of 30.2 percent in the parlor and sleeping-car revenues.

The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943. Compared with the same month in 1942, that month resulted in an increase of 0.2 percent in freight revenue and 32.8 percent in passenger revenue for the southern region and 7.4 and 27.2 percent, respectively, for the country, but in a reduction in net railway operating income from all rail operations of 61.4 percent for the southern region and 55.9 percent for

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[4] Illinois Central, $578,425; Tennessee Central Railway Company, $84,185; Gulf, Mobile & Ohio; and Clinchfield.

[5] The boundaries of the southern region are generally the same as those of southern passenger association territory, except that the southern region does not embrace any portion of Virginia or West Virginia.

the country. For the year 1943, the increase over 1942 was 13.3 percent in freight revenue and 67.9 percent in passenger revenue for the southern region and 14.1 and 60.8 percent, respectively, for the country, but the net railway operating income fell below that for 1942 by 9 and 8.3 percent, respectively. The monthly increases over the corresponding months of the preceding year in the passenger revenues of the railroads of the country, including those in the southern region, have been quite steadily declining. Thus in July 1943, that increase was 74.4 percent for the southern region and 70.4 percent for the country, and in December of that year it was 32.8 and 27.2 percent, respectively. Also, the net railway operating income has steadily declined from a deficit compared with that for the same month of the preceding year of 12.1 percent for the southern region and 9.7 percent for the country in July, to 61.4 and 55.9 percent, respectively, for December; so that, due to increased expenses and taxes, the net railway [fol. 103] operating income of the railroads in the southern region dropped from $28,578,717 in December 1942 to $11,035,492 in December 1943.

During recent years, the principal respondents herein have expended large sums of money in remodeling and air-conditioning their passenger equipment. For example, the Southern has air-conditioned or purchased new, with air-conditioning facilities, 189 coaches. It has purchased 6 two-car Diesel units and 16 Diesel-powered locomotives for passenger-train service. The Seaboard has air-conditioned and modernized 71 coaches and 23 combination passenger and baggage cars and 33 dining cars.

Wartime operations have placed added burdens on the passenger departments and facilities of respondents and have resulted in unusual expenses, such as for safeguarding operations and providing expedited movements of troop trains. For example, during November 1943, the Southern operated 353 troop trains, and 1,178 cars with troops were operated by it in regular trains. A special representative of the railroad rides each troop train. Much deadhead movement of equipment is necessary in assembling cars for these troop movements and in returning them to the points where they will again be needed, and additional terminal switching costs are incurred. Troop movements are given preference over all freight trains and certain passen-

ger trains, and this occasions delays to freight and passenger trains, with resulting increased costs in wages and fuel therefor. Some of these expenses are reflected in the freight accounts of respondents. Their general offices must be kept open in some instances 24 hours a day and in others from 12 to 16 hours in order to make provision for troop movements, thus requiring the services of a greater number of employees and resulting in increased expenses. On troop movements the Government does not pay the full published fare, but is allowed a discount of 5 percent from commercial fares, except where the movement is by a route over which land-grant deductions are applicable, in which event the deduction allowed is 50 percent of the commercial fare, plus a further deduction of 3 percent. There is no land-grant mileage in North Carolina, Kentucky, or Tennessee, but there is considerable such mileage in Alabama.

The large increase in passenger traffic has made necessary a marked expansion of ticket-selling forces. Most of the through trains are operated in two sections, requiring the use of two full crews; additional ticket helpers and porters have been employed on all through trains; and at the principal passenger terminals train-dispatching platform, switching, roadway, mechanical, and equipment-repair forces have been greatly augmented. Because of the war, respondents are experiencing great difficulty in obtaining competent help.

[fol. 104] The average hourly rate of compensation in 1942 of all employees of the principal respondents in these proceedings ranged from about 24 to 27 percent higher than in 1936. At the time of the hearings there were pending demands by the railroad operating and nonoperating unions for wage increases, including the retroactive application of certain of such increases to February 1, 1943. We may notice officially that wage increases have since been granted and are now being paid. Since we prescribed the 2-cent basic coach fare as reasonable in 1936, there has been a substantial increase in the cost of materials and supplies used by railroads in the southern region, ranging from 22 percent for iron and steel products to 48 percent for lumber and other forest products. Also, since then the railway tax accruals of respondents have greatly increased. For example, those of the 14 respondents in No. 28963 increased, in round figures, from $34,400,000 in 1936 to $170,500,000 in 1942, or by 395 percent. Such accruals appor-

tioned to the passenger service of 12 those respondents, under our formula, increased in those years by 244 percent.

On or about October 1, 1942, upon request of the Government, respondents and other railroads generally established for both interstate and intrastate travel reduced round-trip coach fares on the basis of 1.25 cents a mile, available only to personnel of the Army, Navy, Marine Corps, Coast Guard, Women's Naval Reserves, Women's Army Corps, Women's Coast Guard Reserves, and Women's Marine Corps Reserves, traveling in uniform and at their own expense when on official leave, furlough, or pass; also to nurses when not traveling in uniform, upon presentation of proper identification, and under similar conditions to personnel of the military forces of the allied nations. Respondents do not propose to increase any of those fares.

The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads of the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte No. 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943, such as inductions into the armed forces of great numbers of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movement of Army troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary.

[fol. 105] In July 1943, the North Carolina Utilities Commission filed with us a petition for a general investigation on our own motion of the lawfulness of the interstate coach fares to, from, and through North Carolina. That petition, together with petitions dated July 31, 1943, of the Price Administrator and August 27, 1943, of the Alabama Public Service Commission for a general investigation of the reasonableness, under present conditions, of the interstate coach fares of all of the railroads in southern territory, was denied by our order of October 11, 1943. The present interstate fares, one-way and round-trip, are either the

equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10-percent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents.

The Relation of the Intrastate Fares

The intrastate fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions about to be mentioned, were on the same basis as the interstate fares for more than 34 years prior to October 1, 1942. From April 1, 1908, to June 9, 1918, the basis of the one-way intrastate and interstate fares was 2.5 cents a mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, that fare basis was increased to 3 cents and so remained until August 26, 1920. On that date, the interstate fare, and shortly thereafter the intrastate fares, became 3.6 cents in all classes of equipment, plus a surcharge for passengers traveling in sleeping and parlor cars of 50 percent of the charge for space occupied in such cars. This basis was continued until the above-mentioned experimentation with lower fares began in 1932 and 1933, and thereafter until October 1, 1942, the intrastate fares in all four of these States were generally on the same basis as the interstate fares.

On October 1, 1942, as stated, the interstate one-way fares became 2.2 cents in coaches and continued at 3.3 cents in sleeping and parlor cars, and the round-trip fares became 180 percent of the one-way fares with a return limit of [fol. 106] 3 months for coaches and 166⅔ percent of the one-way fares with a return limit of 3 months for parlor and sleeping cars. These are the interstate fares now in effect.

The Alabama intrastate one-way fares of respondents were, on October 1, 1942, and still are, 3.3 cents in sleeping

and parlor cars and 1.65 cents in coaches, except that the Gulf, Mobile & Ohio, Illinois Central, and St. Louis-San Francisco maintain coach fares of 2.2 cents other than in instances where they meet the 1.65-cent fare of competing lines. On or about October 26, 1942, respondents in No. 28963 filed with the Alabama Public Service Commission tariffs to become effective December 1, 1942, to increase the basic one-way coach fare to 2.2 cents, making it uniform with that applicable for interstate travel, and to make effective intrastate the round-trip fares which had been established uniformly for interstate application on October 1. This proposal included cancelation of the 30-day limit round-trip fares then in effect intrastate on the basis of 2.475 cents per mile and the 6-month limit round-trip fares on the basis of 2.75 cents per mile, both good for transportation in sleeping and parlor cars; also cancellation of the 15-day limit round-trip coach fares on the basis of 1.485 cents per mile and the 60-day limit round-trip coach fares on the basis of 1.65 cents per mile. The Alabama commission suspended operation of the tariffs and after a hearing issued its report and order on January 15, 1943, canceling the suspended tariffs and denying respondents' proposal to make such fares and charges effective on intrastate traffic in Alabama.

The Kentucky intrastate one-way coach fares of respondents were on October 1, 1942, and still are, 1.65 cents, except that the Gulf, Mobile & Ohio and Illinois Central maintain coach fares of 2.2 cents other than in instances where they meet the 1.65 cent fare of competing lines, and the Chesapeake & Ohio maintains a fare of 2.2 cents, except on its Louisville-Winchester line. Respondents in No. 29000 filed with the Railroad Commission of Kentucky tariffs, to become effective December 1, to increase the basic one-way coach fare to 2.2 cents, making it uniform with that applicable for interstate travel, and to make effective intrastate the round-trip fares which had been established uniformly for interstate application on October 1. This proposal included cancelation of the 15-day limit round-trip coach fares on the basis of 1.485 cents per mile and the 60-day limit round-trip coach fares on the basis of 1.65 cents per mile, and substitution therefor of the 3-month limit round-trip fares on the basis of 1.98 cents per mile. The Kentucky commission suspended operation of the tariffs, and after a hearing issued its report and order on May 31, 1943,

denying respondents' proposal to make such one-way and round-trip coach fares and charges effective on intrastate passenger traffic in Kentucky, but approving proposed [fol. 107] changes in round-trip fares for transportation in sleeping and parlor cars.

By petition filed October 12, 1942, with the North Carolina Utilities Commission, the several railroads operating in North Carolina, with the exception of the Norfolk & Western, sought authority to increase the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars in that State to the level of the interstate fares. The intrastate one-way and round-trip coach fares of the Norfolk & Western, which has about 100 miles of railroad in North Carolina, are the same as the interstate fares. The North Carolina commission, by report and order of July 8, 1943, approved the proposed changes in the round-trip fares in sleeping and parlor cars, but deferred decision on the proposal to increase the fares in coaches pending further administrative action by it. As a result of that order, the present intrastate one-way coach fares in North Carolina are 1.65 cents a mile; and the intrastate round-trip coach fares in that State are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days.

In Tennessee, the operation of the tariffs published by the railroads proposing to increase all lower intrastate fares in that State to the level of the corresponding interstate fares was suspended by the Railroad and Public Utilities Commission of the State of Tennessee, and by its report and order of August 30, 1943, that commission denied the railroads' proposal. As a result, the present intrastate one-way coach fares in Tennessee are 1.65 cents a mile, except that the one-way coach fares of the Illinois Central, Gulf, Mobile & Ohio, and St. Louis-San Francisco are 2.2 cents, other than in instances where they meet the 1.65-cent fare of competing lines. The intrastate round-trip coach fares are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days. The intrastate round-trip sleeping and parlor-car fares are 2.475 cents a mile with a return limit of 30 days, and 2.75 cents a mile with a return limit of 6 months.

Section 13 (4) confers upon us the power to raise intrastate rates or fares to the reasonable interstate level upon a showing that the intrastate rates or fares cause either un-

due or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

Undue advantage, preference, or prejudice.—Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers. Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding dis- [fol. 108] tances. The differences in favor of the intrastate passengers range from 22 cents for 40 miles to $1.90 for 347 miles in coaches in each of the four States, and somewhat less in sleeping and parlor cars in Alabama and Tennessee. Thus, for example, from Columbus, Miss., to Anniston, Ala., 186 miles, the coach fare is $4.11, and from Sheffield, Ala., to Anniston, 193 miles, it is $3.30; a difference of 81 cents; from Lexington, Ky., to Columbus, Ohio, 197 miles, the fare is $4.44, as compared with a fare of $3.35 from Lexington to Owensboro, Ky., 199 miles, a difference of $1.09; from Charlotte, N. C., to Spartanburg, S. C., 75 miles, the fare is $1.65, whereas from Charlotte to Greensboro, N. C., 94 miles, it is $1.55, a smaller fare intrastate by 10 cents for a greater haul by 19 miles; from Chattanooga, Tenn., to Asheville, N. C., 240 miles, the fare is $5.32, and from Chattanooga to Bristol, Tenn., 242 miles, the intrastate fare is $4.05, a difference of $1.27.

So also, illustrations are of record showing differences between the fares over interstate and intrastate routes between points in the same State. Thus, between Piedmont, Ala., and Hurtsboro, Ala., the fare is $5.21 over the interstate route, 235.9 miles, and $4.05 over the intrastate route, 236.9 miles, a difference of $1.16. Between Memphis, Tenn., and Knoxville, Tenn., the fare over the interstate route is $9.39, and over the longer intrastate route it is $7.10, a difference of $2.29. Similar situations are exhibited with respect to the round-trip fares. They exist in each of the four States where and to the extent that the intrastate fares are on a lower basis than the interstae fares. It would serve no useful purpose to multiply such illustrations, for all are based upon the fact that the interstate fares are made on the basis of 2.2 cents per mile, while the intrastate fares are based on 1.65 cents per mile.

All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same. The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of repondents' lines on which the intrastate and the interstate bases are now the same.

Unjust discrimination.—On the basis of audits made for representative periods by the principal respondents in each of these proceedings, the estimated amount of additional revenue which the respondents in the respective States would have received during those periods if the assailed intrastate fares had been on the interstate level, projected over the period of a year, exceeds $750,000 per annum in [fol. 109] Alabama, $526,000 in Kentucky, $558,000 in North Carolina, and $556,000 in Tennessee.

The intrastate fares in each of the States may be used to defeat or break down the interstate fares, and thereby reduce the revenues on interstate traffic. Thus, passengers destined to points outside the respective States may now purchase intrastate tickets to points on or near the State line and either rebuy tickets or pay cash for the remainder of the journey. Technically, they break their journey when they leave the train at the points on or near the State line to purchase tickets for beyond the State, but practically they resort to a device which defeats the through fares. Typical illustrations are of record for each of the States, but one will suffice: The interstate coach fare between Raleigh, N. C., and Knoxville, Tenn., over the Southern is $8.91; the intrastate coach fare from Raleigh to Hot Springs, N. C., is $5.25, and that from Hot Springs to Knoxville is $2.05.* By purchasing an intrastate ticket from Raleigh to Hot Springs and either purchasing a ticket at Hot Springs or paying cash for the remainder of the journey, a passenger traveling from Raleigh to Knoxville can thus save $1.61. So also, of course, passengers can avoid paying the higher interstate fares by using the cheaper intrastate routes between points in the same State, in instances such as those above referred to, from and to which there are both interstate and intrastate routes.

Specific evidence that the intrastate fares have been and are being used to defeat or avoid payment of the interstate fares in particular instances was not submitted, and admittedly is difficult to obtain. Respondents, however, are convinced that these practices are common; that their elimination would have an important effect upon the additional revenues which they would receive if the intrastate fares were on the same level as the interstate fares; and that they can be eliminated only by establishing such a parity.

An increase in the intrastate fares to the interstate level under existing conditions, respondents insist, will not result in any important loss of traffic to other forms of transportation and will produce increased revenues substantially equivalent to those estimated by them.

Protestants' contentions and evidence—Alabama.— Protestant Alabama Public Service Commission, by three State employees, two of whom are its own field inspectors, offered evidence of the crowded condition of trains, and the large number of passengers who as a result were required to stand. From this evidence protestant argues that the persons seated must have been interstate passengers, and that intrastate passengers receive an inferior service. One of the witnesses rode in the coaches of a Louisville & Nashville train from Mobile to Montgomery, [fol. 110] Ala., every alternate Friday night, and for the preceding 3 months had not been able to obtain a seat. It was not shown that the train had not stopped at other Alabama stations before reaching Mobile, nor that other intrastate passengers boarding the train at Mobile did not obtain seats. It may be that on this particular train more long-haul, and hence more interstate, passengers than intrastate passengers were seated on the trip from Mobile to Montgomery. But the suggestion that the service accorded to intrastate passengers generally in Alabama on interstate trains is inferior to that accorded to interstate passengers is not supported by the evidence of record.

The present intrastate fares in Alabama appear to be somewhat higher than bus fares from and to the same points. From Birmingham to 12 destinations the average rail coach fare is $1.5275, the average proposed fare is $1.9975, and the average bus fare is $1.425; from Montgomery to 8 destinations the respective average fares are $1.985, $2.616, and $1.893. While the tendency of an in-

crease in the coach fares, without a corresponding increase in the bus fares, would be to drive traffic to the busses, the latter are already experiencing as great or greater congestion than the trains.

Protestant points out that much of the added expense of the operations of some of respondents arises in connection with or is due to the movement of troop trains, and that these are interstate movements; and it contends that civilian intrastate fares should not be increased to assist in bearing that burden. To concede the correctness of this contention might be to impair the effectiveness of the provisions of section 15a relative to adequate and efficient railway service, and to defeat the national transportation policy as declared in 54 Stat. L. 899, relative to developing, coordinating, and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense, and requiring that all of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the stated declaration of policy.

Kentucky.—Protestant Railroad Commission of Kentucky shows that the present intrastate one-way fares between representative points average 14.7 percent higher, and the proposed fares 40.7 percent higher, than the one-way bus fares from and to the same points, and the present and proposed round-trip fares average 9 and 41 percent higher than the round-trip bus fares. Differences in rail and bus fares are sometimes due to differences in distance.

Passenger traffic and revenues therefrom in Kentucky have increased in recent years, as indicated by reports of [fol. 111] the 5 respondents in No. 29000 having approximately 96 percent of the total railroad mileage in Kentucky. Passenger revenues earned in Kentucky on intrastate and interstate traffic were $4,182,411 in 1939, $4,493,479 in 1940, $6,497,525 in 1941, and $14,023,436 in 1942. Passengers carried by the same railroads and for the same years were 2,925,085, 3,065,609, 3,931,378, and 6,633,604. Passenger-miles increased from 230,594,000 in 1939 to 723,909,000 in 1942. The average number of passengers per car-mile was 10.6 for 1939 and 22.3 for 1942. As indicating the proportion of passenger revenues accruing in Kentucky which is derived from intrastate traffic only, for the Louisville

& Nashville in 1939 the total was $2,200,241 and the intrastate $519,726, while the corresponding revenues for the Chesapeake & Ohio were $682,716 and $146,987.

Turning to the system figures for the seven principal respondents, following is a comparison of 1942 and 1943, from the record as supplemented by stipulation of counsel at the argument: Freight revenues, $684,523,687 and $763,303,989; passenger revenues, $101,210,404 and $177,785,481 total operating revenues, $827,410,532 and $993,210,774; total operating expenses, $485,698,121 and $577,890,293; operating ratio, 58.7 and 58.2; and net railway operating incomes, $156,601,762 and $149,784,991.

Protestants point out that these seven respondents in the last 2 years have been able to take care of their increases in operating expenses and railway tax accruals, and still show consistent and substantial increases in their net railway operating income. The relation of net railway operating income to investment in railway property including cash, materials, and supplies, for these respondents reflects average rate of return, after Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent.

The Price Administrator, on behalf of himself and the Director of Economic Stabilization, opposes any increase in fares. He relies upon the facts that when passenger service was furnished at a loss, this Commission approved general levels of freight rates which took into consideration these passenger losses, *Fifteen Percent Case, 1937-1938*, 226 I. C. C. 41, 54; that these returns from freight traffic have been multiplied during the war by greatly increased freight traffic; and that the passenger service itself is now returning a profit. It is therefore contended that either the passenger fares or the freight rates should be reduced.

If freight traffic is now producing more than a fair return for the above-mentioned or any other reason, it may be dealt with in an appropriate proceeding. The evidence [fol. 112] here before us does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return.

North Carolina.—In its brief and upon oral argument the North Carolina commission contends that respondents in No. 29036 erred as a matter of law, in that they failed to exhaust their remedies before that commission prior to

filing their section 13 petition with us, on the ground that its order was interlocutory in form and was so issued in order that it might file with us the petition before-mentioned for investigation of the interstate coach fares. It asserts that the matter was and still is open for consideration by it. The instant proceeding was not instituted until after we had fully considered the petition of the North Carolina commission and had denied that petition. In view of this fact, and of the time which has elapsed since respondents petitioned that commission on October 12, 1942, for authority to increase the intrastate coach fares in that State, we do not believe that we would be justified in deferring action in this proceeding and requiring respondents to renew their efforts before that commission for authority to increase these fares. Moreover, the issues presented for our consideration here differ in important respects from those which are within the jurisdiction of that commission, and our duty under the Interstate Commerce Act, as we see it, is to decide these issues on the record now before us.

This protestant contends that the intrastate coach fares in that State properly should be on a lower level than the interstate fares, and that the existing disparity between these fares does not result in undue preference or prejudice, nor in unjust discrimination against interstate commerce. A similar contention is made by protestants Charlotte Shippers and Manufacturers Association and the North Carolina Division of the Travelers Protective Association of America. The position of these protestants is that the interstate coach service in North Carolina has deteriorated and is inferior to the interstate coach service in that State. Three of the principal respondents operate a limited number of modern streamlined air-conditioned coach trains on which seats are reserved without charge in addition to the basic fare, and these trains make scheduled stops in North Carolina only at the principal cities. These protestants contrast the equipment and service afforded by those trains with the less desirable equipment and service afforded by certain local trains of some of respondents in that State. They give examples of the crowding of coaches on the latter trains far beyond their seating capacities and of the operation of such coaches in an untidy condition. The equipment and service of the streamlined coach trains is also contrasted with the service on certain branch lines of one of respond-

ents, which is provided in each instance by mixed trains [fol. 113] of a number of freight cars and an antiquated combination passenger-and-baggage or passenger-and-mail or express car.

Passenger traffic on most of these branch lines is light. Crowded coaches are not peculiar to intrastate travel in North Carolina, but are common also in interstate travel in that and other States in southern terrifory, as well as in all other sections of the country. Passengers frequently litter the cars with paper and other refuse, and thereby contribute to the untidy condition of the cars; and the crowded conditions of the cars makes difficult and often impracticable the task of keeping them clean en route. Wartime travel by railroad has resulted in such a demand for passenger coaches that every available coach is being used, and upon their arrival at the terminals, time and labor are not always sufficient to permit cleaning the coaches as thoroughly as in normal times. Admittedly, interstate as well as intrastate passengers may and do travel on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accomodations and service furnished intrastate passengers.

The Price Administrator contends that the proposed increase in fares is inconsistent with the wartime stabilization program; further, that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if we should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares.

In *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, and in the report on further hearing in *Increased Railway Rates, Fares, and Charges, supra*, we discussed contentions that rate increases therein proposed would be inconsistent with the efforts of the Government to avoid inflation and would conflict with the provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act, and executive regulations thereunder. We concluded that the provisions of these acts, except those pertaining to the giving of notice and consent to intervene to the designated Federal agent, made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by rail-

road. The provisions of these acts respecting the giving of notice and consent to intervene to the designated Federal agent have been complied with in each of these proceedings.

The evidence bearing upon the further contention of the Price Administrator has been recited hereinbefore.

Tennessee.—The Tennessee commission contends that the standards of transportation offered intrastate passengers in Tennessee do not conform, on the average, to those offered interstate passengers in that State, and that for this reason intrastate and interstate passengers in that [fol. 114] State are not transported under substantially similar circumstances and conditions.

On each of the branch lines of respondent Nashville, Chattanooga & St. Louis, passenger service is provided by a mixed train consisting of a number of freight cars and a passenger coach, which is used also by some of the train crew in lieu of a caboose. The schedules on which such trains are operated are governed primarily by the amount of freight service to be performed. Six of these branch lines, comprising somewhat more than a third of the total mileage of this respondent in Tennessee, are wholly within that State. The coaches used on these lines are old and second grade in accomodations and maintenance. Passenger service on the main lines of this respondent, and of other respondents, is provided generally by scheduled passenger trains, including a number of modern streamline all-coach trains or combination streamlined coach and pullman-car trains of generally first-grade accommodations and maintenance. Three streamlined all-coach trains are operated through Tennessee, each on alternate days, one over the lines of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, another over the Illinois Central, and a third over the Louisville & Nashville. These trains make regularly scheduled stops in Tennessee, other than at Nashville, only to take on passengers destined to certain points outside of the State or to discharge passengers coming from such points. The coaches of these trains are air-conditioned, seats are reserved without charge in addition to the regular fare, and some of these trains carry lounge or observation cars which in normal times are available to coach passengers. One combination coach and pullman-car train also makes regularly scheduled stops at only two points in Tennessee, one of such stops being limited to passen-

gers destined to or coming from points beyond the State. The other such train makes regularly scheduled stops at a number of points in Tennessee.

Respondent Nashville, Chattanooga & St. Louis operates six passenger trains daily over its main line in each direction between Nashville and Chattanooga. One of these is the streamlined all-coach train mentioned above. Of the remaining five, one is a local train which stops at practically all intermediate points, and the other four are express trains which stop at a limited number of intermediate points and at some of them only on signal. The Nashville, Chattanooga & St. Louis and the Tennessee Central operate air-conditioned so-called chair or cafe coaches on certain of their trains between a number of points in Tennessee in which seats may be reserved at an extra charge in addition to the regular fares.

With the exception of the streamlined trains operated by certain of them, the equipment and service offered intra- [fol. 115] state and interstate passengers in Tennessee by the other respondents and on other lines of the Nashville, Chattanooga & St. Louis in that State are not described of record.

Interstate as well as intrastate passengers may and do travel on the mixed trains described above, and the facilities and service furnished interstate passengers in such circumstances are the same as the facilities and service furnished intrastate passengers. The Nashville, Chattanooga & St. Louis also operates two interstate branch lines between certain points in Tennessee and certain points in Alabama, and passenger service on these lines is also provided by mixed trains.

The evidence contrasting the facilities and service available chiefly to interstate passengers on a limited number of modern streamlined air-conditioned coach trains with the facilities and service available to intrastate passengers on certain of the main lines of one of respondents is insufficient to establish that the standards of transportation afforded intrastate coach passengers in Tennessee, on an average, differ materially from those afforded interstate coach passengers in that State. At best, it shows that some of the trains operated in that State are superior to others, a situation which obviously is not peculiar to Tennessee alone.

Discussion and Findings

The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in Ex Parte No. 148, wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 percent for the duration of the war, is reasonable for general application. Such a fare is now in effect for one-way application generally throughout the country, except intrastate in the four States the fares in which are here before us. Also, the respective round-trip fares for application in coaches and in sleeping and parlor cars are uniform generally throughout southern territory, except intrastate in these four States on traffic in coaches and intrastate in Alabama and Tennessee on traffic in sleeping and parlor cars.

Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States. The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wiconsin R. Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide, and is similar [fol. 116] in every respect to that before us in *Rhode Island Commutation Fares*, 253 I. C. C. 383, and in *Increases in Texas Rates, Fares, and Charges, supra.*

The revenue lost to respondents in each of these States by reason of the lower intrastate fares is substantial, and the transportation conditions under which the intrastate service is performed do not differ materially from those under which the interstate service is performed. Section 13 (4) of the act empowers us to increase intrastate rates or fares so that the intrastate traffic may produce its fair share of the earnings required by the respondent carriers to enable them to provide adequate and efficient railway transportation service, both interstate and intrastate. *United States* v. *Louisiana, supra*, page 75; *Florida* v. *United States*, 292 U. S. 1; *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474. "The effect of maintaining

a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried * * * under substantially the same conditions." *Illinois Commerce Comm.* v. *United States, supra*, page 485.

We find that—

1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from, and through those respective States on the other, are substantially similar.

4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

5. Respondents' revenues under the lower intrastate fares are loss by at least $725,000 per annum in Alabama, [fol. 117] $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required

to enable respondents to render adequate and efficient transportation service.

6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State.

The foregoing findings are without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification, thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act.

In accordance with our practice in such proceedings, we shall leave to respondents and the respective State commissions the matter of adjusting the intrastate fares to conform to these findings. If this is not accomplished within 30 days from the service of this report, consideration will be given to the entry of an appropriate order.

SPLAWN, Commissioner, dissenting:

In my judgment the decision of the majority on the evidence in these proceedings goes beyond our lawful power under section 13 (4). This view, I think, finds full support in several decisions by the Supreme Court of the United States in which the Court has had occasion to review some of our reports and orders under that section.

It should be emphasized that our authority under section 13 (4) to require increases in intrastate rates springs from and is an incident of the duty to regulate and protect interstate commerce. In exercising that power to nullify State authority we should be guided by the following wise [fol. 118] and well-settled principles or standards which have been announced by the Supreme Court: (1) That this Commission has no general authority to regulate intrastate rates; (2) that the provision of section 13 (4) prohibiting unjust discrimination against interstate commerce is to be considered in connection with section 15a; (3) that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear; and (4) that the mere existence of a disparity between rates on intrastate and interstate traffic does not warrant our prescribing, intrastate rates. *Florida* v. *United States*, 282 U. S. 194, 211-212.

These proceedings present two questions. First, do the intrastate passenger fares imposed by authority of these States cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand? And second, do the intrastate fares cause any undue, unreasonable, or unjust discrimination against interstate commerce?

In considering the first question it is important to observe that the prohibition against undue prejudice and preference as between persons and localities in interstate and intrastate commerce in section 13 (4) is substantially the same as the prohibition against undue prejudice and preference contained in section 3 (1). The principal difference between the two provisions is that section 3 (1) prohibits a *carrier* from giving an undue preference or causing an undue prejudice, while section 13 (4) prohibits any intrastate *rate, fare*, et cetera from causing the undue preference or undue prejudice. In view of the similarity of the language employed in the two provisions, we have said that evidence to sustain an order and finding that intrastate rates are violative of section 13 (4) in that they unduly prejudice persons or localities must be of equal dignity and probative value as the evidence required to sustain a finding under section 3 (1). *Barrett Co.* v.

Atchison, T. & S. F. Ry. Co., 172 I. C. C. 319, 334. The soundness of that rule is evident, for both provisions are directed against the same evils, namely, undue prejudice and undue preference as between localities and persons.

We have frequently found that the mere existence of a disparity in rates does not warrant a finding of undue prejudice and preference under section 3 (1), and that ordinarily the evidence to support such a finding must establish that such prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another. To say that the evidence necessary to sustain a violation of the provision of section 13 (4) as to undue prejudice and preference as between localities and persons, can be of less dignity or less probative value [fol. 119] than the evidence necessary to show a violation of section 3 (1) ignores completely the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear.

In support of their contention that the intrastate fares now maintained in these States cause undue prejudice and preference as between persons and localities, respondents rely upon (1) the similarity of the intrastate and interstate services, and (2) the differences in the fares.

The provision of section 13 (4) which deals with prejudice and preference as between persons and localities, as previously noted, corresponds to section 3 (1). Both of these provisions obviously are for the protection of persons and localities, and not primarily for the benefit of the carriers. The second provision of section 13 (4), which is discussed later herein, provides a complete remedy for the carriers in situations where intrastate rates, fares, et cetera, unlawfully discriminate against interstate commerce.

With respect to the situations in Kentucky and Alabama, for example, no persons who pay the higher interstate fares and no localities are appearing herein to complain of undue prejudice and preference, or, without complaining, have testified that they are in anywise injured, and so far as these records disclose, none has complained to respondents. Under these circumstances we would not even have before us a complaint under section 3 (1), much less the evidence on which to base a finding of a violation

of that section. Respondents do not ask relief for any particular persons or places, but seek State-wide orders.

In *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, and *State of New York* v. *United States*, 257 U. S. 591, the Court held that orders entered by this Commission under section 13 (4) requiring horizontal increases of intrastate passenger fares throughout the States of Wisconsin and New York, to correspond with fares for like interstate service in the same States, could not be sustained as orders to remove undue prejudice and preference as between persons and localities. In the *Wisconsin case*, at page 580, in referring to the "sweep" of our order the Court said:

> It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, can not give the order validity. As said by this court in the *Illinois Central R. R. case*, [245 U. S. 493]: "It is obvious that an order of a subordinate agency, such as the Commission, [fol. 120] should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." See also *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627.

In this report it is stated that "The evidence in each of these proceedings, therefore, contrary to the situation dealt with in [the *Wisconsin case*], establishes a condition which is State-wide." "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States." Is it to be supposed that interstate passengers did not likewise ride on all trains to and from all branch and main-line points in Wisconsin? The cases are distinguishable, but in the following respect: In the *Wisconsin case* there was evidence that localities in Minnesota and Michigan in close proximity to localities in Wisconsin competed for the location of industries, and

for retail trade, and to some extent for wholesale trade. This competition was affected by the lower State fares. In these cases there is no evidence whatever of competition or injury. The Court found that there was evidence which would support a finding of undue prejudice and preference against a large class of fares. As above indicated, objection to the Commission's order was that it was not restricted to the border points to which the evidence pertained, but that it included fares between all interior points although they might not be near the border and the fares between them might not work a discrimination against interstate travelers at all. To assume that the court supposed that interstate passengers did not travel to and from the interior points, and to attempt to distinguish the cases upon that ground, is to miss the real point of distinction, which is that in the *Wisconsin case* there was evidence going beyond a mere showing of a difference in rates for similar services, and which tended to show injury to interstate localities, while the records herein are devoid of evidence of injury. If the order of the Commission there could not be sustained as an order to remove undue prejudice and preference as between persons and localities, what can be said in support of that phase of the State-wide orders herein which are unsupported by evidence beyond the mere difference in fares?

Turning now to the second question: Do the intrastate fares cause undue or unjust discrimination against interstate commerce? Here, respondents rely upon the loss of revenues which they contend has resulted from refusal of the State rate authorities to permit the intrastate fares to be increased to the interstate level. In Kentucky, for example, the estimated annual loss of revenue to all of the principal respondents in that State approximate $526,000.

[fol. 121] Section 15a, which is intended, among other things, to insure a fair return for carriers provides that in the exercise of our power to prescribe just and reasonable rates we shall give due consideration, among other factors, to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide

such service. In the *Wisconsin case*, at page 586, the Court referred to the "dovetail relation" between the provision of section 13 (4) relating to unjust discrimination against interstate commerce and the purpose of section 15a, as it then stood, and pointed out that if that purpose is *interfered with* by a disparity of intrastate rates we are authorized to end the disparity by directly removing it. Continuing, at page 590 the Court stated that action by the Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce. It should be noted that at the time of the decision in the *Wisconsin case*, section 15a did not read the same as at present, but its general purpose was to secure to the carriers revenue sufficient to enable them to provide in the public interest adequate and efficient transportation service, the same as under the present provisions.

That something more than a disparity between interstate and intrastate rates is necessary to support a finding of undue discrimination against interstate commerce is made quite plain in *United States* v. *Louisiana*, 290 U. S. 70, 74, 75, wherein the Court stated:

By section 416 of the Transportation Act, section 13 (4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This Court has consistently held that this section is to be construed in the light of section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So construed, section 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Wisconsin Railroad Comm'n* v. *C., B. & Q. R. Co., supra*, 586, 587, 588, 589, 590; *New York* v. *United States*, 257 U. S. 591, 601;

Florida v. *United States, supra,* 211; *Louisiana* v. *United States,* 284 U. S. 125, 131; see *Nashville, C. & St. L. Ry. Co.* v. *Tennessee,* 262 U. S. 318.

In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive the additional revenue, which would result from [fol. 122] increasing the present intrastate fares to the interstate level, operates to *interfere with* or to *thwart* the broad purpose of section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce.

In the Kentucky proceeding, for example, the relation of net railway operating income to investment in railway property including cash, materials, and supplies, for the seven principal respondents shows average rates of return, after deduction of Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; 1942, 5.78 percent. In this connection it is of interest that based on 1940 valuations recommended by our Bureau of Valuation the average rates of return for the respective years indicated would be 4.18 percent, 5.31 percent, 5.57 percent, 7.81 percent, 8.50 percent, and 8.13 percent. The increase in net railway operating income for passenger traffic alone, 1942 over 1941, was $50,992,801 for the 12 class I respondents in the Alabama proceeding, and $29,506,275 for the 7 principal respondents in the Kentucky proceeding.

I wish to emphasize my disagreement with finding 5 in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues *required* to enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable

respondents to render the character of service contemplated by section 15a.

In each of these four States the State regulatory authority, after due consideration, authorized an increase of 10 percent on the going intrastate fares and declined to order or authorize a further increase to the interstate level. The fact that some of the adjoining States have permitted increases in intrastate fares to the interstate level is not binding upon the duly constituted authorities of these four States. The evidence in these proceedings does not sustain the contention that the maximum fares for interstate travel must also be the minimum fares for intrastate travel.

I am authorized to say that Commissioners Aitchison and Mahaffie join in this expression.

[fol. 123] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed June 29, 1944

Now comes the United States of America, one of the defendants in the above-entitled cause, and for answer to the complaint or petition herein, answers and says:

1. Except as hereinafter expressly admitted, this defendant denies each and every allegation in the complaint contained. This defendant admits the allegations contained in those paragraphs of the complaint designated by the symbols #100 through #105.1 inclusive, and #120 through #136 inclusive, and #138 and #140, to the extent that they relate to matters of fact as distinguished from conclusions of law or opinions of the pleader, in so far as they are not inconsistent with the statements contained in the Interstate Commerce Commission's report of March 25, 1944 and its order pursuant thereto, made on May 8, 1944 and corrected on May 24, 1944, to which paragraph #103 of the complaint refers, to set aside which the present proceeding was instituted, and a copy of which was not attached to the complaint but should be placed before this Court before judicial review thereof by this Court may be had by plaintiffs, to which ref-

erence is hereby made for a more particular and accurate [fol. 124] statement of the matters and things referred to in the aforesaid paragraphs of the complaint.

2. In answer to the paragraphs of the complaint designated by the symbols #106 through #119 inclusive, this defendant says that copies of the documents referred to and enumerated therein did not accompany the copy of the complaint or petition which was served upon this defendant, and this defendant objects to their being made a part of the complaint by reference, and says that to the extent that the said documents constitute or contain evidence pertinent to this cause they should be offered in evidence at the trial, and this defendant reserves its right to make objection to the offer of such portions of the material enumerated in the aforesaid paragraphs of the complaint as may be irrelevant, immaterial, or otherwise inadmissible.

3. In answer to those paragraphs of the complaint designated by the symbols #137, #141, and #141.1, this defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in the said paragraphs; but alleges that the matters and things therein referred to are not relevant or material to any questions before this Court for decision in this cause.

4. This defendant admits the allegations contained in that paragraph of the complaint designated by the symbol #142.

5. This defendant denies the allegations contained in those paragraphs of the complaint designated by the symbols #139 and #143 through #181 inclusive, to the extent, if any, that the said paragraphs relate to matters of fact as distinguished from conclusions of law and opinions of the pleader; and this defendant does not acquiesce in but disagrees with the conclusions of law set forth in the said paragraphs. This defendant alleges that the order of the Interstate Commerce Commission, made on May 8, 1944 and corrected on May 28, 1944, was within the statutory power of [fol. 125] the Commission and was duly made upon substantial evidence and appropriate findings and in accordance with applicable principles of law and without violation of any constitutional requirements and was and is in all respects valid. This defendant specifically denies that plaintiffs are entitled to a trial *de novo* before this Court with regard to any so-called jurisdictional facts or other facts;

and this defendant alleges that the jurisdiction of this Court over this cause, which is a suit against the United States, is statutory and is limited to such judicial review as is prescribed by law with respect to orders of the Interstate Commerce Commission of the kind here involved.

6. This defendant objects to the consideration by this Court of the affidavit of Frank A. Downing, attached to the complaint under the designation "Appendix #156.1," verified on May 31, 1944, and the affidavit of H. M. Nicholson, attached to the complaint under the designation "Appendix #178.1," verified May 31, 1944, on the ground that they are incompetent, irrelevant, and immaterial, and were not offered in evidence before the Interstate Commerce Commission and considered by it in making its order which is assailed in this cause.

Wherefore, this defendant prays that the relief prayed for by plaintiffs in those paragraphs of the complaint designated by the symbols #182 to #182.7 inclusive, be denied (except with respect to service of process and the convening of a Three-Judge Court pursuant to statutory provisions), and that the complaint be dismissed at plaintiffs' costs by this Court as so constituted and proceeding in accordance with the manner prescribed by law for the trial and hearing of [fols. 126-127] suits to set aside orders of the Interstate Commerce Commission of the kind here involved.

Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.

Wendell Berge, Assistant Attorney General; J. O. Carr, United States Attorney.

I certify that copies of the foregoing answer were this day mailed to the following persons:

J. C. B. Ehringhaus, Esq., Wachovia Bank Building, Raleigh, North Carolina;

F. C. Hillyer, Esq., 227 West Forsyth Street, Jacksonville 2, Florida;

J. Stanley Payne, Esq., Interstate Commerce Commission, Washington 25, D. C.

Charles Clark, Esq., Southern Railway System, Washington 13, D. C.;

N. D. Miller, Esq., Room 5319, Federal Office Building No. 1, Washington 25, D. C.

Edward Dumbauld, Special Assistant to the Attorney General.

June 22, 1944.

[fol. 128] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER OF THE UNITED STATES—Filed June 30, 1944

Now comes the United States, a defendant herein, and amends its answer to the complaint to read as follows:

I

Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, has filed a motion to intervene as a plaintiff in this case and has also filed an intervening complaint seeking to have the order of the Interstate Commerce Commission here involved set aside.

II

A situation is thus presented where one Government agency is seeking to intervene as a party plaintiff in this case and another Government agency, the Interstate Commerce Commission, is a defendant in the same case. Under these circumstances, and in view of the fact that both Government agencies will have an opportunity to present their respective positions through their own counsel, the United States has determined to remain neutral in these proceedings in the District Court, without prejudice to its supporting the position of one or the other agency in any appeal which may be taken from the decree of this court.

III

Accordingly, the United States neither admits nor denies any of the allegations of the complaint of the above plaintiffs or the intervening complaint of the Economic Stabilization Director.

Edward Dumbauld, Special Assistant to the Attorney General.

Wendell Berge, Assistant Attorney General.

[fols. 129-130] CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above amended answer upon each of the following counsel in this case by mailing them a copy thereof this 27th day of June 1944.

Edward Dumbauld, Special Assistant to the Attorney General.

J. C. B. Ehringhaus, Esq., Wachovia Bank Building, Raleigh, N. C.;

F. C. Hillyer, Esq., 227 West Forsyth Street, Jacksonville 2, Florida;

J. Stanley Payne, Esq., Interstate Commerce Commission, Washington 25, D. C.;

Charles Clark, Esq., Southern Railway System, Washington 13, D. C.;

N. D. Miller, Esq., Room 5319, Federal Office Building No. 1, Washington 25, D. C.;

Frank W. Gwathmey, Esq., Shoreham Bldg., Washington, D. C.

[fol. 131] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—Filed July 8, 1944

Come now, under and by virtue of Title 28, U. S. C. Section 45a,

Aberdeen and Rockfish Railroad Company,
Atlantic and East Carolina Railway Company,
Atlantic Coast Line Railroad Company,
Carolina and Northwestern Railway Company,
Carolina, Clinchfield and Ohio Railway,
Carolina, Clinchfield and Ohio Railway of South Carolina, operated as Clinchfield Railroad by Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees,
Danville and Western Railway Company,
Louisville and Nashville Railroad Company,
Norfolk Southern Railway Company,
Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers),

Southern Railway Company, and
Winston-Salem Southbound Railway Company,

and move the court for leave to appear and intervene in the above-stated case and to become parties defendant thereto in order to protect their rights involved in said case.

[fol. 132] Each of said movants is and for some years has been a corporation, or receivers of a corporation, engaged in operating a railroad within the State of North Carolina, and by its own rails or in connection with the rails of some one or more of the other movants engaged in operating a line of railroad between points within the State of North Carolina and points in other states within Southern territory; Southern territory is familiarly described and known as embracing those states lying south of the Ohio and Potomac Rivers and east of the Mississippi River;

And as such corporations, or receivers thereof, each of said movants has operated and is now operating as a common carrier of passengers by railroad intrastate within the State of North Carolina and interstate within Southern territory; and as such has been and is subject to the provisions of the Act of Congres known as the Interstate Commerce Act;

And said movants, jointly and severally, are vitally interested in the subject matter of this complaint. They are the common carriers by railroad operating within the State of North Carolina upon whose petition the Interstate Commerce Commission instituted the investigation docketed No. 29036 in which the report of March 25, 1944, and the two orders of May 8, 1944, set out as exhibits to the complaint herein by identifications #114, #118, and #119, respectively, were made and issued.

[fol. 133] And each of said movants desires to here appear and intervene on behalf of defendants, United States of America and Interstate Commerce Commission, and to answer the bill of complaint and participate in the trial thereof as a party defendant.

Frank W. Gwathmey, 1110 Shoreham Bldg., Washington, D. C.; Charles Clark, Southern Railway Office Bldg., 15th & K Streets, N. W., Washington, D. C., Attorneys for Movants.

[fols. 134-135] ORDER

The foregoing motion read and considered; let the same be filed; and it is further ordered that the motion be allowed and that the movants, and each of them, be and they are hereby made parties defendant in the above-entitled cause.

I. M. Meekins, United States District Judge.

This 6th day of July, 1944.

[fols. 136-138] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAIL LINES OPERATING IN NORTH CAROLINA; INTERVENING DEFENDANTS—Filed July 8, 1944

Come now, in due season, rail lines operating in North Carolina, who are intervening defendants herein, and for answer to the petition or complaint herein filed by the State of North Carolina and its Utilities Commission, say:

These intervening defendants, jointly and severally, hereby adopt the answer herein filed on behalf of the Interstate Commerce Commission as their answer in the same manner and to the same extent as though each paragraph thereof were herein fully set out.

Wherefore, having answered, these intervening defendants pray that the petition or complaint herein be dismissed.

F. W. Gwathmey, 1110 Shoreham Bldg., Washington 5, D. C.; Charles Clark, Southern Railway Office Bldg., 15th & K Streets, N. W., Washington 13, D. C., Attorneys for North Carolina Rail Lines, Intervening Defendants.

[fol. 139] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

Civil Action, No. 189

THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA UTILITIES COMMISSION, Plaintiffs,

versus

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants

Transcript of Hearing—Filed September 29, 1944

This cause coming on to be heard, and being heard, before a Special District Court consisting of the Honorable John J. Parker, United States Senior Circuit Judge, Fourth Circuit, the Honorable I. M. Meekins, United States District Judge for the Eastern District of North Carolina, and the Honorable John J. Hayes, United States District Judge for the Middle District of North Carolina, at Fayetteville, North Carolina, on Wednesday, July 12, at 10 o'clock a. m., the following proceedings were had:

APPEARANCES:

J. C. B. Ehringhaus, Raleigh, N. C., for the Plaintiffs.

J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C., for the Interstate Commerce Commission.

[fol. 140] M. D. Miller, Chief Counsel of Common Carrier Section, Transportation and Public Utilities Division, Office of Price Administration, Washington, D. C., appearing for Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, Intervening Plaintiff.

Frank W. Gwathmey, Special Counsel, 1110 Shoreham Building, Washington, D. C., appearing for railroads operating in North Carolina, Intervening Defendants.

Joseph P. Cook, Southern Railway Office Building, Washington, D. C., appearing for Southern Railway, Intervening Defendant.

Forman Smith, Assistant Attorney General of Alabama, appearing for the State of Alabama, *amicus curiae*.

M. B. Holifield, Assistant Attorney General of Kentucky, Frank L. McCarthy, Chairman, Kentucky Railroad Commission, and J. E. Marks, Commerce Counsel, Kentucky

Railroad Commission, appearing for the State of Kentucky and the Kentucky Railroad Commission, *amici curiae.*

Leon Jourolmon, Jr., Attorney at Law, 123 War Memorial Building, Nashville, Tenn., appearing for the State of Tennessee and the Railroad and Public Utilities Commission of the State of Tennessee, *amici curiae.*

* * * * * * *

[fol. 141] PROCEEDINGS

Judge Parker: Proceed, gentlemen.

Governor Ehringhaus: Do you wish us to go ahead with the evidence?

Judge Parker: It seems to me that it would be advisable first to have each side state the main points in the case, according to their view of it, so that we may have a general idea of what is involved. I do not mean that you should go into the argument now, but just state briefly what you contend are the issues.

Governor Ehringhaus: We should like to have the record show, if your Honors please, that the interveners, having come in under the order of intervention, adopt the petition that has been filed by the North Carolina Utilities Commission.

Judge Parker: That may be allowed. Let the record so show.

Is it agreed that the case be submitted for final decree at this hearing?

Governor Ehringhaus: That is the point we are coming to.

Judge Parker: Go ahead.

Governor Ehringhaus: In the event of an adverse decision by this tribunal we would still suggest to the Court the [fol. 142] propriety and advisability of a temporary restraining order, to preserve the *status quo* until we could be heard in the Supreme Court of the United States. We are keeping always before this Court, as presently constituted, the request for a temporary restraining order. That is the basis of its jurisdiction, and I do not want to waive that point. With that conceded, I am quite willing that the matter be considered on the merits.

Judge Parker: Submission for final decree is the way we ordinarily put it. Without waiving the plea for injunc-

tion, it is submission for final decree. That gives the Supreme Court opportunity to consider it.

Governor Ehringhaus: There are two points that we wish to make—that the findings of the Interstate Commerce Commission are not sufficient to support its order and, second, that the evidence is not sufficient to support the findings of the Commission. As to the finding by the Commission that there is an undue burden on interstate commerce——

Judge Parker: You make the point that we have the right to inquire into that question *de novo*?

Governor Ehringhaus: We make the point that there is no substantial evidence to support that finding of fact. Even if it were——

Judge Parker: No evidence to show prejudice between persons and localities, and, second, no eyidence to show [fol. 143] prejudice against interstate commerce?

Governor Ehringhaus: The Commission's finding is of prejudice between interstate and intrastate passengers and not between localities.

Judge Parker: Very well.

Governor Ehringhaus: I should like the record to show in the beginning exactly what we are offering, before we go into the argument.

Judge Parker: Let's get the appearances in the record.

Governor Ehringhaus: Mr. M. D. Miller is appearing on behalf of Chester Bowles, Price Administrator, Intervener. Mr. Miller is of counsel for the Office of Price Administration, Washington, D. C.

There are also present today representatives of the State of Alabama, the State of Kentucky, and the State of Tennessee, who desire as *amici curiae* to make representations to the Court. There is independent pending litigation presenting their claims in other jurisdictions.

Judge Parker: Who appears for the Interstate Commerce Commission?

Mr. Payne: J. Stanley Payne, appearing for the Interstate Commerce Commission.

Judge Parker: Do you wish to make a statement?

Mr. Payne: I should like to call your Honors' attention [fol. 144] to Section 13, Paragraphs 3 and 4, of the Interstate Commerce Act. We contend that the findings of the Commission are wholly adequate, that all the findings are fully supported by substantial evidence, that the Statute it-

self is not in contravention of the Constitution, and that the parties are not entitled here to a trial *de novo* in any respect, and that, in general, the order is binding.

Judge Parker: On what grounds does the I. C. C. ask the Court to sustain the order?

Mr. Payne: On the ground that the intrastate coach fare of 1.65 cents per mile, as compared with the interstate coach fare of 2.2 cents per mile, for passengers riding in the same train, frequently in the same coaches, often in the same seats, is und-ly prejudicial against the interstate passengers and unduly preferential of the intrastate passengers and, moreover, results in a discrimination against interstate commerce in that the revenues of the carriers are less by $525,000 a year than they would be if the intrastate fares were raised to the level of the interstate fares.

Judge Parker: Your points are these: First, discrimination with reference to passengers and localities; second, discrimination in that intrastate traffic does not bear its proportionate share of the cost of the operation.

Mr. Payne: Correct, with one slight change. The Commission did not find undue discrimination against localities.

[fol. 145] Governor Ehringhaus: What is your position with respect to a trial *de novo*?

Mr. Payne: We think that is settled by the decision of the Supreme Court in Florida v. United States, 292 U. S., page 1, in which the Court held, in substance, that the judicial review of a Section 13 order is the same as a judicial review of any other order of the Interstate Commerce Commission.

Concerning the matter of stabilization we contend that the Commission did give full consideration to the Stabilization Act and committed no error.

Mr. Gwathmey: I am appearing here on behalf of the railroads operating in North Carolina, which are intervening defendants.

I should also like to say that Mr. Charles Clark, Attorney for the Southern Railway Company, one of the very important lines in this case, had expected to be here today but was unable to come because of sickness; and I should like to introduce Mr. Joseph P. Cook, who is appearing for the Southern Railway.

Our position is one of support of the Interstate Commerce Commission.

Judge Parker: That concludes the statements. Proceed with the evidence.

OFFERS IN EVIDENCE

Governor Ehringhaus: I offer, first, Section 100 of the petition and of the answer.

[fol. 146] Judge Parker: That is unnecessary. The pleadings are before the Court. You need not offer any of the pleadings in evidence, because the pleadings are before the Court.

Governor Ehringhaus: The first thing, if your Honors please, that did not appear in the pleadings is the brief of the Price Administrator that was filed before the Interstate Commerce Commission. We want to tender that, so that it may be made a part of the record.

Judge Parker: I suggest that you offer the record of the proceeding before the Interstate Commerce Commission.

Governor Ehringhaus: Yes, sir, and we offer the brief of the Price Administrator referred to in Section 119.1 of the petition.

Judge Parker: You do not object to that, do you?

Mr. Payne: No, I think it should go in as part of the record.

May I suggest that I think the record before the Commission should be offered here as evidence.

Governor Ehringhaus: We have no objection to that. I will offer it as soon as I can get it.

Judge Parker: Where is it?

Governor Ehringhaus: It is in the Clerk's office.

Judge Parker: Mr. Marshal, ask one of the clerks to bring in the record in this proceeding.

The plaintiffs introduce in evidence the entire record [fol. 147] made before the Interstate Commerce Commission, including the brief of the Price Administrator. The record not being present in the court room, it is understood that if the record now in the possession of the Clerk is not the correct certified record the same will be supplemented.

(Record produced by Clerk.)

Governor Ehringhaus: I have here the brief of the Price Administrator, which is not in there.

Judge Parker: That has been received.

(Record before Interstate Commerce Commission and brief of Price Administrator received in evidence.)

Governor Ehringhaus: Next I offer the answer of the railroads to the petition for further hearing.

You have no objection to that?

Mr. Payne: No objection.

Judge Parker: It may be received.

(Answer of railroads to petition for further hearing received in evidence.)

Governor Ehringhaus: I next offer photostatic certified copies of the monthly and annual reports of the carriers to the Interstate Commerce Commission.

Judge Parker: Are they part of the record in the proceeding?

Mr. Payne: The annual reports are not.

Judge Parker: Can not we take judicial notice of those [fol. 148] annual reports?

Mr. Payne: I think not.

Judge Parker: Do you object?

Mr. Payne: Yes, on the ground that they constitute evidence which was not before the Commission.

Governor Ehringhaus: There would be a real dispute on that point. It is our position, which will be amplified by the Price Stabilization unit, that they are covered by the stipulation which appears in the record. We insist that they are competent and considerable by this Court by judicial notice. Also on the point that there is involved here the possibility of irreparable damage and that they tend to show the present financial situation of the railroads.

Mr. Payne: We object to the annual reports on the ground that they go beyond the record of the Commission. Neither the monthly statistical reports nor the annual statistical reports were physically introduced at the hearing, but at the oral argument before the Commission all counsel stipulated that the Commission might consider the monthly statistical reports which had been gotten out since the close of the hearing, and I insist that that was all that was covered by the stipulation—the monthly statistical reports and not the annual reports.

Governor Ehringhaus: Will your Honors hear me on that?

[fol. 149] Judge Parker: I think we will overrule the objection and, in the interest of time, hear you on it when you come to your principal argument. The reports are admitted subject to further ruling.

(Monthly and annual reports of carriers to Interstate Commerce Commission received in evidence, subject to further ruling.)

Governor Ehringhaus: The next thing we offer is a certified copy of Rule 93 of the Interstate Commerce Commission which is the rule governing the filing of briefs.

Judge Parker: I think we can take judicial notice of that.

Mr. Payne: I think you can. There is no objection, anyway.

Governor Ehringhaus: I next offer certified copy of the request made by the Utilities Commission of the State of North Carolina of the railroads for certain data—the request made in the cause pending before the Utilities Commission of North Carolina, which was the first step in the railroads' effort to bring about the raising of the intrastate rate to the 2.2-cents level.

Mr. Payne: We object on two grounds; first, that it is not part of the record of the evidence before the Commission, and, second, that it is immaterial and irrelevant in this suit.

Judge Parker: The Court will admit it, subject to [fol. 150] further ruling.

(Certified copy of request of North Carolina Utilities Commission for certain data received in evidence, subject to further ruling.)

Governor Ehringhaus: The next thing we offer, if your Honors please, is the original affidavit of Mr. Frank A. Downing, which was attached to the petition in this cause and which is an analysis or interpretation of the facts appearing in the reports which have been offered in evidence, particularly bearing on the question of revenue returns to the railroads.

Judge Parker: Do you object to that?

Mr. Payne: Yes, your Honor, on the same ground—that it is not a part of the record of the evidence before the Commission.

May I suggest that if your Honors go beyond the record before the Commission there is no telling how far you may go.

Judge Parker: I am thoroughly conversant with that rule.

The affidavit is admitted, subject to further ruling.

(Affidavit of Frank A. Downing received in evidence, subject to further ruling.)

Governor Ehringhaus: I now offer the amended affidavit. [fol. 151] Mr. Payne: Same objection.

Judge Parker: Same ruling.

(Amended affidavit received in evidence, subject to further ruling.)

Governor Ehringhaus: Then I offer the affidavit of Mr. Nichols, referred to in the complaint, Section 178.1, for the purpose of showing irreparable damage.

Mr. Payne: Same objection.

Judge Parker: Same ruling.

(Affidavit of —— Nichols received in evidence, subject to further ruling.)

Governor Ehringhaus: That is all.

Judge Parker: Is there any evidence for the Intervener?

Mr. Miller: I have copies of the Executive Orders mentioned in Allegations 2 and 3 of the Intervener's complaint. The Statute provides that judicial notice shall be taken of matters published in the Federal Register, but I have four copies of these orders, for filing.

Judge Parker: I see no necessity for introducing them in evidence. You may furnish them to the Court, for our convenience.

Mr. Miller: I then have certified copies of certain pages of the Reports of the Interstate Commerce Commission which are set out in quotation in the Intervener's Complaint, in [fol. 152] Allegation No. 15 (b).

Judge Parker: What are you offering, Mr. Miller?

Mr. Miller: I am offering pages of the Interstate Commerce Commission's report, certified by the Interstate Commerce Commission as true copies, in support of the allegation that the Interstate Commerce Commission had——

Judge Parker: You are introducing pages of their report in this case?

Mr. Miller: Yes, sir.

Judge Parker: They are already in the record.

Mr. Miller: These are different reports. They are not the reports in this cause.

Judge Parker: Other reports referred to by the Commission?

Mr. Miller: Yes, sir. You will recall that in Allegation No. 15 (b) there is a contention that the Commission had included within its general level of rates a support factor in the freight rate, which compensated, at least in part, for the passenger service which was producing the deficits, and in that is included a quotation from certain other reports, and this exhibit which I wish to offer is a certified copy of the pages of the Commission's reports in which those statements are found.

Judge Parker: Do you conceive that to be proper evidence in this case?

[fol. 153] Mr. Miller: Well, your Honor, those cases could be considered by the Commission, and in our brief and throughout the case we made the contention that the Commission should consider this support factor.

Judge Parker: What do you say, Mr. Payne?

Mr. Payne: I have no objection.

Judge Parker: Admitted.

(Certified copies of certain pages of certain Interstate Commerce Commission reports received in evidence.)

Mr. Miller: I have some additional statements of the Interstate Commerce Commission's Bureau of Statistics and Transport Economics. Mr. Payne asked me to have these certified and introduced into the record. I promised to do so and am now doing it. They consist of Statement M-100 for the months of August, September, October, November, and December, 1943, Statement No. 150 for the months of July, August, September, October, and November, 1943, and Statement No. 250 for the same months.

Mr. Payne: No objection.

Mr. Miller: They are the monthly statistical reports that were stipulated into the record at the argument and are actually part of the record, although they are not physically therein.

Judge Parker: All right. They come in without objection.

[fol. 154] (Statements M-100, 150, and 250 of Bureau of Statistics and Transport Economics, Interstate Commerce Commission, for the months specified, received in evidence.)

Mr. Miller: I also have another group of three statements, Statement M-100 for the month of June, 1943, and for the months of January and February, 1944.

Judge Parker: Is there objection to that?

Mr. Payne: Yes, sir. They are not part of the record and could not have been, because they were issued after the decision of the Commission.

Judge Parker: I think that is manifestly so.

Admitted for the present, subject to further ruling.

(Statement M-100, for the months specified, received in evidence subject to further ruling.)

Mr. Miller: Some mathematical errors were found and have been corrected by another affidavit, which is similar to that introduced. It is simply a correction of certain errors. I have attached that to the amended complaint and it merely revises those figures.

I should like to offer in evidence the second affidavit attached to the amended complaint.

Mr. Payne: Objection on the same ground, that it is outside the record.

Judge Parker: Same ruling.

Second affidavit attached to amended complaint, correct-
[fol. 155] ing certain mathematical errors, admitted in evidence subject to further ruling.

Mr. Miller: That is all I have.

Judge Parker: Is there any evidence for the Interstate Commerce Commission?

Mr. Payne: Yes, sir.

Judge Parker: Proceed.

Mr. Payne: The Commission wishes to file the answer of the Commission to the complaint of the Office of Price Administration.

I have official printed copies of the Commission's report in No. 26550, Passenger Fares and Surcharges, 214 I. C. C. 174, which I hand to your Honors for convenient reference.

Similarly, I file copies of the Commission's report in Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 145. Also the Report of the Com-

mission on Further Hearing in the same case, 255 I. C. C. 357; also a still later report in the same case, Supplemental Report of the Commission, 256, I. C. C. 502; finally, the Second Supplemental Report of the Commission in the same case, dated May 12, 1944, which is not yet printed.

Judge Parker: As I understand, you are not offering any of these in evidence but are just furnishing them for the Court's convenience.

Mr. Payne: That is correct, your Honor.

[fol. 156] Judge Parker: Proceed.

Mr. Payne: I offer a certified copy of the Commission's order of January 21, 1942, in case No. 148. I offer this in evidence. This is the order that permitted the 10-percent increase in passenger fares, interstate, and is not reported anywhere, although the first report of the Commission, 248 I. C. C., I understand refers to this order.

Governor Ehringhaus: No objection.

Judge Parker: Admitted.

(Certified copy of Order of Interstate Commerce Commission, dated January 21, 1942, received in evidence.)

Mr. Payne: That is all.

Judge Parker: Is there anything for the railroads?

Mr. Gwathmey: I join in Mr. Payne's objection to the receipt of the affidavits of F. A. Downing and others on the ground that they include matters which were not in the record before the Interstate Commerce Commission.

In case the Court should admit them, I have had prepared the affidavit of J. S. Tassant, General Statistician of the Southern Railway, and also the affidavit of F. H. Oliver, of the Southern Railway, verifying all the correspondence which the railroad had with the North Carolina Utilities Commission.

Judge Parker: They should be admitted, I assume, subject to the ruling on the other affidavits. If the other affidavits go out then they go out, too.

[fols. 157-160] Mr. Gwathmey: Yes, your Honor.

I have nothing further.

Judge Parker: The evidence is closed.

Is there anything further before the argument?

Mr. Jourolmon: I should like to move that I be permitted to present a memorandum brief as *amicus curiae*, on behalf

of the State of Tennessee and the Tennessee Railroad and Public Utilities Commission.

Judge Parker: It will be received. Have you three copies?

Mr. Jourolmon: I have three copies. I shall be glad to present them before the close of the day.

Mr. Holifield: I should like to file a brief on behalf of the State of Kentucky and the Kentucky Railroad Commission, as *amicus curiae*.

Judge Parker: Very well.

Mr. Smith: There are some points which I think should be brought to the Court's attention, and which I presume the learned counsel will cover in their argument. If they do not, I should like to have about five minutes to present them.

Judge Parker: We will hear from you if you wish to be heard.

The plaintiff may proceed with their argument.

(Thereupon argument of the case ensued, being concluded at 4:35 o'clock p. m., at which time the Court adjourned *sine die*.)

[fol. 161] Offer in Evidence

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 29036

IN THE MATTER OF PASSENGER FARES AND CHARGES FOR INTRASTATE TRAFFIC BETWEEN POINTS IN NORTH CAROLINA

PETITION OF BEHALF OF RAILROADS OPERATING IN THE STATE OF NORTH CAROLINA—July 22, 1943

To the Interstate Commerce Commission:

The railroads listed in Appendix 1 hereto, hereinafter referred to as petitioners, present this petition and respectfully show:

I

Petitioners are common carriers by railroad and are engaged, according as their respective lines are located, in the transportation of persons and property in interstate com- [fol. 162] merce to, from, and between points in the State of North Carolina, and are likewise engaged in the trans-

portation of persons and property in intrastate commerce between points within the State of North Carolina. As such common carriers, each of your petitioners is subject to the provisions of the Acts of Congress known as the Interstate Commerce Act, as amended, and the Transportation Act of 1940.

This petition is filed pursuant to the provisions of the said Acts of Congress and more particularly Sections 3, 13, and 15(a) of the said Interstate Commerce Act, as amended.

II

In *Passenger Fares and Surcharges*, 214 I. C. C. 174, the Commission found that passenger fares of 2 cents per mile in coaches would be reasonable for application throughout the United States. At the same time it found that the "experimental" fares of 1.5 cents per mile for one-way transportation in coaches, which was then being maintained by most of the railroads operating in Southern Passenger Association territory, was not unlawful. Thereafter, effective November 15, 1937, the railroads operating in Southern Passenger Association territory, including your petitioners, increased their basic coach fare, interstate and intrastate, to 2 cents per mile; but, effective January 15, 1939, these railroads, with certain exceptions, restored the experimental fare of 1.5 cents per mile which had previously been in effect. This subnormal fare was restored by the lines in question because of a conviction that the reduction was necessary under the circumstances then existing in order to attract passenger traffic to the railroads.

[fol. 163] III.

By its order of January 21, 1942, in Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, this Commission approved a proposed uniform increase of 10 per cent in all passenger fares and charges, with certain provisions as to the disposition of fractions. Thereupon, interstate passenger fares throughout the United States were increased 10 per cent, effective February 10, 1942. The basic interstate coach fare of 1.5 cents per mile generally in effect in the South thus became 1.65 cents, and the basic coach fare of 2 cents per mile generally in effect throughout the rest of the United States became 2.2 cents. The same increase of 10 per cent was authorized by the North Carolina Utilities Commission in the North Caro-

lina intrastate fares on February 5, 1942, and effective February 10, 1942, your petitioners increased their intrastate one-way coach fares in North Carolina to 1.65 cents per mile.

IV

On July 14, 1942, substantially all of the railroads operating in Southern Passenger Association territory, including all of your petitioners, filed a petition with this Commission for the authority necessary to enable them to increase all fares for one-way interstate transportation in coaches to 2.2 cents per mile, thereby seeking to establish the same basis of fares for transportation in coaches throughout Southern Passenger Association territory as applied elsewhere throughout the United States.

Upon consideration of said petition, this Commission, on August 1, 1942, entered an order reading, in part, as follows:

[fol. 164] "*And it further appearing,* That a basic coach fare of 2 cents per mile was approved by the Commission for application prior to Ex Parte No. 148 on railroads generally throughout the country, including the lines of said petitioners; that a general increase of 10 per cent was authorized to be made in all passenger fares in Ex Parte No. 148, for the reason set forth in the report therein, *supra;* and that a basic coach fare of 2.2 cents per mile is now maintained on Class I railroads generally throughout the country, with the exception of the aforesaid petitioners:

* * * * * * * * * *

"*It is further ordered,* That the order of January 21, 1942, in Ex Parte No. 148, be, and it is hereby, further modified so as to authorize the aforesaid petitioners to apply the increase of 10 per cent approved in said order to a basic coach fare of 2 cents per mile on the lines of said petitioners, subject to the rule for the disposition of fractions as modified by order of July 6, 1942, in said proceeding, and that in all other respects said order of January 21, 1942, shall remain in full force and effect."*

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* The supplemental order of July 6, 1942, in Ex Parte No. 148, here referred to, provided that "fractions of less than 0.5 cent shall be dropped and fractions of 0.5 cent or greater may be increased to the next whole cent."

Pursuant to the authority of said order, your petitioners and other railroads operating in Southern Passenger Association territory filed tariffs with this Commission to become effective October 1, 1942, increasing their fares for one-way interstate transportation in coaches to 2.2 cents per mile. These tariffs became effective October 1, 1942, and are now in effect throughout Southern Passenger Association territory, including North Carolina.

[fol. 165] On the same date, your petitioners and the railroads generally in all territories established a uniform basis of interstate round-trip fares in lieu of the round-trip fares constructed on various basic rates and within varied return limits which had previously been in effect. The round-trip coach fares so established are three-months limit fares made on the basis of 180 per cent of the one-way coach fares of 2.2 cents per mile for the round trip, or 1.98 cents per mile traveled. The round-trip fares good for transportation in sleeping or parlor cars, established at the same time, are likewise three-months limit fares, but are on the basis of 2.75 cents per mile.

V

On or about October 12, 1942, petitioners filed with the North Carolina Utilities Commission a petition seeking authority to establish for intrastate travel in North Carolina the one-way coach fare of 2.2 cents per mile which had already been established by petitioners for interstate travel, as hereinbefore shown, and to make effective also, at the same time, the uniform round-trip fares which had been established for interstate application on October 1, 1942.

Pursuant to the provision of the Act of Congress entitled "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and For Other Purposes," approved October 2, 1942, Executive Order 9250, dated October 3, 1942, and Order No. 1 of the Director of Economic Stabilization, dated October 14, 1942, your petitioners gave due notice to the Price Administrator of the Office of Price Administration of the proposed increases in their fares for instrastate transportation of passengers between points in North Carolina, and consented to the timely [fol. 166] intervention by the Price Administrator before any state or federal authority having jurisdiction to consider such increases.

The North Carolina Utilities Commission, after due notice, held a hearing on May 20, 1943 at Raleigh, N. C., at which time and place your petitioners offered evidence fully justifying the changes proposed in their intrastate fares for the purpose of putting them upon the interstate level, and on July 8, 1943, the North Carolina Utilities Commission issued its report and order, authorizing the proposed changes in fares for transportation in sleeping or parlor cars, but declining to authorize the increase proposed by your petitioners in one-way and round-trip coach fares, stating that it would defer action on this phase of the petition until it has exhausted the "administrative remedy" referred to in its report. The administrative remedy contemplated by said Commission is explained in the following excerpt from its report:

> "In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together, but upon a record such as that before us in this proceeding where the standard appears improper it does not mean that we are bound to perfunctorily endorse and adopt that standard. Our course is to first pursue the administrative remedy that is open to us and we sha' ove in that direction by addressing a petition to the I. rstate Commerce Commission, seeking an investigation by that body of the interstate civilian coach fares to and from the State of North Carolina."

A complete copy of the report and order is attached hereto as Appendix 2 to this petition.

[fol. 167] VI

Petitioners aver that the interstate passenger fares and charges which they now have in effect to and from points in North Carolina are just and reasonable, and that the passenger fares and charges which they are required to maintain for intrastate application in North Carolina as a result of the failure of the North Carolina Utilities Commission to authorize petitioners to put their intrastate coach fares on the interstate level, cause an undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce in North Carolina, on the one hand, and interstate commerce, on the other, and undue,

unreasonable, and unjust discrimination against interstate commerce in violation of the Interstate Commerce Act, as amended, and particularly Sections 3 and 13 of said Act.

Petitioners further aver that by reason of the application of the said intrastate coach fares and charges within the State of North Carolina they are being deprived of a large amount of revenue to which they are rightfully entitled, and that this loss in revenue results in an undue burden upon and a discrimination against interstate commerce and an undue preference of intrastate commerce in violation of the Interstate Commerce Act, as amended. Petitioners are also being subjected to further losses by reason of interstate passengers purchasing tickets to points in North Carolina on or near the border and repurchasing at such points. For example, the published fare from Raleigh, N. C., to Knoxville, Tenn., is $8.91, but if the traveller purchases a ticket to Asheville, N. C., and then purchases a ticket from Asheville to Knoxville, the total fare paid is only $6.35, or $1.46 less than the through interstate fare. Similarly, while the fare from Fayetteville, N. C., to Richmond, [fol. 168] Va., is $4.56, a passenger may, by buying a ticket from Fayetteville to Weldon, N. C., and repurchasing at that point, save 68 cents in the transportation charges. These illustrations could be multiplied indefinitely.

Petitioners further show that if the intrastate coach passenger fares and charges which they are now required by State action to maintain for intrastate application in North Carolina are allowed to remain in effect the purpose of the Interstate Commerce Act will be defeated, and the result will be a continuing undue and unreasonable advantage and preference of intrastate commerce, and a continuing undue prejudice and undue, unreasonable, and unjust discrimination against interstate commerce and as between persons and localities.

Petitioners aver that the order of the North Carolina Utilities Commission, copy of which is attached hereto as Appendix 2, has the effect of denying the proposal of the North Carolina carriers to put their intrastate coach fares on the interstate basis, although the said order refers to the determination of the issue as being only deferred. The failure of the North Carolina Utilities Commission to decide the issue deprives petitioners of the right to remove the advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and inter-

state commerce, on the other hand, and the discrimination against and undue and unreasonable burden upon interstate commerce just as effectively as would a final order of denial entered by that body.

Wherefore, your petitioners pray that the Commission institute at an early date an investigation with respect to the matters and things herein set forth; that, after due notice has been given to the State of North Carolina and [fol. 169] the authorities thereof, and after such hearing or hearings as the Commission may direct, an order be entered declaring discriminatory, prejudicial, unjust, and unlawful, and as creating an undue burden upon interstate commerce, any fares or charges required to be observed for the intrastate transportation of passengers within the State of North Carolina as a result of the order of the North Carolina Utilities Commission, hereinbefore referred to, which are less than the fares and charges now maintained by petitioners for like and similar service in interstate transportation; that this Commission by its order prohibit such advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, and such unjust discrimination against and undue and unlawful burden upon interstate commerce, and prescribe the fares and charges or the maximum and minimum thereafter to be charged in connection with the intrastate transportation of passengers within the State of North Carolina in such manner as in its judgment will remove the advantage, preference, prejudice, and discrimination aforesaid; and petitioners pray for such other general relief in the premises as to this Commission may seem right and proper.

Respectfully submitted, Frank W. Gwathmey, W. A. Northcutt, L. L. Oliver, Attorneys for Petitioners.

Washington, D. C., July 22, 1943.

[fol. 170] APPENDIX 1

Aberdeen and Rockfish Railroad Company
Atlantic and East Carolina Railway Company
Atlantic Coast Line Railroad Company
Carolina and Northwestern Railway Company
Carolina and Tennessee Southern Railway Company

Carolina, Clinchfield and Ohio Railway
Carolina, Clinchfield and Ohio Railway of South Carolina
Lessees: Atlantic Coast Line Railroad Company
Louisville and Nashville Railroad Company
Danville and Western Railway Company
Louisville and Nashville Railroad Company
Norfolk Southern Railway Company
Seaboard Air Line Railway Company, (L. R. Powell, Jr., and Henry W. Anderson, Receivers)
Southern Railway Company
Winston-Salem Southbound Railway Company

[fol. 171] APPENDIX 2

Before the North Carolina Utilities Commission

Order

Docket No. 2789

In the matter of

Petition of Railroads Operating in North Carolina for Authority to Increase Their Basic Coach Fares from 1.65 Cents Per Mile to 2.2 Cents Per Mile for Civilian Travel and to Make Other Adjustments in Passenger Fares

APPEARANCES:

L. L. Oliver, E. E. Young, Cecil Moore, T. K. Lynch, Daniel Makinson, for Petitioners.

Harvey P. Schneiber, for Office of Price Administration, Protestant.

By petition filed October 12, 1942, M. B. Duggan, Chairman of the Southern Passenger Association, for and on behalf of southern railroads operating within the State of North Carolina, the Norfolk and Western Railway Com-
[fol. 172] pany categorically excluded, seeks authority to make changes in intrastate fares and charges, to the extent set out in the paragraphs enumerated below:

One-Way Coach Fares

I. Increase present one-way coach fares from 1.65 cents per mile to 2.2 cents per mile, resolving fractions of 0.5

cent or more to the next whole cent and dropping those under 0.5 cent.

Round-Trip Coach Fares

II. Cancel current fifteen-day and sixty-day limit fares, and establish round trip fares of three-months time limitation on the basis of 180 per cent of the proposed one-way coach fares of 2.2 cents per mile.

Round-Trip First Class Fares

III. Cancel current thirty-day limit fares at 2.475 cents per mile and six-months limit fares of 2.75 cents per mile, establishing in lieu thereof three-months limit fares at 2.75 cents per mile for transportation in sleeping or parlor cars.

Disposition of Fractions, Round-Trip Fares

IV. Continue the present practice of adding sufficient cents to make the total proposed round-trip fare, whether coach or sleeping car, end in "0" or "5".

The petition and the evidence adduced at the hearing on May 20, 1943, rather clearly indicates an obvious motive on the part of petitioners to concur in an effort to attain uniformity and simplicity in passenger fares and charges. However, in light of existing excessive demands for rail [fol. 173] passenger service the reason for proposing to continue special round trip fares does not clearly appear.

In *Passenger Fares and Surcharges*, Docket No. 26550, decided February 28, 1936, the Interstate Commerce Commission reported the results of its first comprehensive investigation of the passenger fare rate structure of the Country at 214 I. C. C. 174. The conditions of record in that proceeding, under which railroad passenger business was conducted at the time of submission, October 4, 1935, are in part classified and set out under captions of that report appearing in the same order as here quoted: (1) "Decline in Railway Passenger Travel" (2) "Financial Results from Passenger Services" (3) "Passenger Market" (4) "Respondent's Efforts to Attract Passenger Business". A greater difference in the then existing conditions suggested by the foregoing headings in contrast with current conditions in railroad passenger business would challenge the

imagination. Under economic, competitive and quality of service conditions prevailing for coach travel in 1935, the Interstate Commerce Commission prescribed 2 cents per passenger-mile as the country-wide maximum basis and found not unreasonable or otherwise unlawful an experimental basis in the Southern District of 1.5 cents per passenger-mile.

The management of the North Carolina lines had differences of opinion as to which rate of coach fare would produce the best revenue results. Our order in Docket No. 761 of July 22, 1936, in response to a petition by the Atlantic Coast Line Railroad Company authorized that carrier to increase intrastate coach fares from the 1.5 cents per mile basis to 2 cents per mile. On petition of the other [fol. 174] carriers, similar increases were authorized by our order of November 13, 1937. These fares were later generally reduced to 1.5 cents per passenger-mile.

The carriers original petition dated December 13, 1941, in Ex Parte No. 148, to the Interstate Commerce Commission pled for a uniform increase of 10 per cent in all interstate coach fares, except those specially published for application to members of the military or naval forces of the United States traveling on furlough. In response to said petition, the Interstate Commerce Commission, by order of January 21, 1942, authorized an increase of 10 per cent, as sought, in the then existing coach fares of 1.5 cents per mile in Southern Passenger Association territory, which basis was in conformity with and by virtue of the order of February 28, 1936, in I. C. C. Docket No. 26550, *Passenger Fares and Surcharges*. The North Carolina lines likewise filed a petition with us on December 29, 1941, which petition supported by a copy of the petition of December 13, 1941, to the Interstate Commerce Commission, in Ex Parte No. 148, we approved on February 5, 1942, authorizing an increase of ten per cent in the intrastate coach fares, bringing such fares from 1.5 cents per mile to 1.65 cents per mile, without questioning the propriety of what was at that time only a slight spread between the fare of 1.65 cents per mile in coaches for civilian travel and 1.25 cents per mile for members of the armed forces traveling on furlough. Apparently the petitioners deemed unnecessary any explanation of the spread referred to, for none was made, nor was there any reason given for the absence of such a spread in the higher sleeping and parlor

car fares. The motive for basing the coach fare spread on 1.25 cents per coach passenger mile, rather than 1 cent or 1⅓ cents is unexplained.

[fol. 175] Appendix 3, to the petition here under consideration, filed on October 12, 1942, is a copy of a petition filed by Southern Passenger Association members with the Interstate Commerce Commission on July 14, 1942, seeking relief from the order of February 28, 1936 *supra*, to the extent necessary to permit filing of tariffs by petitioners to provide an increase in their basic coach fares from 1.65 cents per mile to 2.2 cents per mile. The Interstate Commerce Commission denied the petition pro forma in Docket No. 26550 but in a separate paragraph of the same order of August 1, 1942, the order of January 21, in Ex Parte No. 148, was modified, "* * * so as to authorize the aforesaid petitioners to apply the increase of 10 per cent approved in said order to a basic coach fare of 2 cents per mile on the lines of said petitioners * * *". Shortly thereafter tariffs were filed by the Southern lines, effective October 1, 1942, increasing their basic interstate coach fares to 2.2 cents per passenger per mile.

Petitioners statistical evidence is largely confined to results of passenger operations of the Class I railroads operating in the state of North Carolina, viz., Atlantic Coast Line, Clinchfield, Louisville and Nashville, Norfolk and Western, Norfolk Southern, Seaboard Air Line and the Southern Railway. Of the group, the Atlantic Coast Line, the Seaboard Air Line and the Southern are trunk lines of primary importance as passenger carrying roads in this State. Passenger operations over the routes of the Clinchfield in the western part of the State and of the Norfolk Southern in the eastern part of the State situated away from the dense passenger traffic lanes are relatively unimportant. Due to shortness of their routes and the lack of coordinated through schedules with other carriers, the demand for and offering of service is limited, in fact, no [fol. 176] service at all is offered over a substantial portion of the Norfolk Southern route. Only a few miles of the Louisville and Nashville route extends into the State of North Carolina. The Norfolk and Western, not a party to this proceeding, has branch lines terminating at Durham and Winston-Salem.

All carriers in the group incurred substantial deficits for the years 1936-1941 inclusive. The deficits for 1941 were

substantially less than for the preceding year of 1940. The trend toward improvement thus indicated was precipitated into an almost astounding reversal of the former unsatisfactory position. Aggregate, net operating deficits of the primary passenger carrying trunk lines, the Atlantic Coast Line, the Seaboard Air Line and the Southern Railway for 1941 was $3,162,100. This in contrast with aggregate net railway operating income of $24,849,901 for the same carriers in 1942, is an increase of truly remarkable proportions. This extraordinarily favorable income, to the extent of the coach revenue contribution, was obtained largely from fares based on 1.65 cents per passenger per mile for civilian travel, rather than on the radically increased basis of 2.2 cents or 33⅓ per cent, per mile sought by the petitioners.

Page 2, of petitioners' Exhibit No. 3, portrays a trend of increasing revenue from passenger fares, excluding allied services. Each of the entire group of seven Class I carriers experienced progressive increases beginning with the year 1940 over 1939, continuing through 1942, wherein the three major passenger carrying trunk lines had aggregate passenger revenues of $89,256,893, an increase over 1941 of $52,180,086, or 141 per cent. Page 3 of the same exhibit shows that an increase in passenger revenue was not needed [fol. 177] in 1942 for the purpose of obviating net railway operating deficits from passenger operations, except for the Clinchfield and the Norfolk Southern, which roads are relatively unimportant as passenger carriers. The statement shows averages for the years 1936-1942, which represent desirable and helpful factual data but clearly indicative of radically and rapidly changing conditions. Page 5 is designed to show average deficits per mile of road for an opening period of the past which was admittedly bad to what appears from other evidence of record as a definite trend toward the superlative.. This page does not show whether passenger service is operated over all the miles of road apportioned to North Carolina. Page 6 shows a rate of return on investment in the Southern region ascertained for 1941, of 4.24 per cent by methods of the Bureau of Railway Economics, Association of American Railroads. For 1943 the rate of return was 6.41 per cent. With respect to coach service interstate fares were based on 1.65 cents per mile until October 1, 1942. The increases of 33⅓ per cent to any appreciable extent did not become effective intrastate in the Southern states until later; therefore, it seems likely

that none of the regulating authorities have had what may be properly termed fresh current evidence before them with respect to the lawfulness of inter and intrastate coach fares for either civilians or members of the armed forces.

Among other things Exhibit No. 4 shows the results of both freight and passenger combined operations of the three principal carriers here involved as reflected in the statistic designated, "Net Railway Operating Income". Here as in the statistics dealing with passenger operations only, a remarkable increase in 1942 over 1941 [fol. 178] is noted of $47,429,458, or 88 per cent. There is no evidence of record to indicate an immediate abatement of the trend thus apparent. This exhibit also shows aggregate revenue for the three principal trunk lines from coach fares of 1.25 cents for members of the armed forces for the entire year of 1942, 1.65 cents civilian fare for most of (partly at 1.5 cents) nine months, and 2.2 cents interstate for three months of the same year, to be an increase of $27,250,643, or 138 per cent over 1941. Increases in 1942 over 1941 are also noted for these carriers in revenue per coach passenger mile and passenger miles per coach mile.

Line 10 of Exhibit No. 5 shows Net Railway Operating Deficits from Passenger and Allied Services Aggregating $60,478,059, for a period of six years, 1936-1941, incurred by the Southern Railway, Atlantic Coast Line Railroad Company and the Seaboard Air Line Railway Company. The statement sets out separately the annual deficits in the period referred to for each road, revealing a substantial reduction of the 1941 deficit under that for 1940. In 1942, the trend continued to surge upward to such an extent that these carriers had aggregate Net Railway Operating Income from Passenger and Allied services of $24,849,901. The exhibit then shows that by deducting the income of one year (1942) from the total deficits of six years (1936-1941) a net deficit remains for the seven year period 1936-1942, of $35,628,158. It is assumed the inference intended is that petitioners are now entitled to an increase in income from coach service only, to recoup past deficits from all passenger operations, which in addition to coach service includes commutation, parlor and sleeping car service, as well as baggage, express and mail operations. When it is considered that revenue from coach service only (other than commutation) in 1942 for these three trunk lines as set out [fol. 179] in Exhibit No. 4, of $47,007,715 is only 43 per

cent, substantially less than half, of the total revenue of $109,488,943 from all passenger and allied services, we are moved to observe that the point is not well taken; especially so since deficient passenger operations in the past have been sustained by income from freight services.

The evidence which brings the operating results of the seven Class I railroads up through December 31, 1942, indicates a very probable need for additional revenue from coach fares by two of the carriers, viz., Carolina Clinchfield and Ohio Railway and Norfolk Southern Railway Company. In 1942, the former incurred a deficit of $84,999 from all passenger operations while the revenue for that year from fares only was $87,422, likewise for the same year the latter road had a corresponding deficit of $134,600 and revenue fares of $240,172. It would be difficult for us to satisfactorily and definitely determine from this record the extent of an increase necessary in coach fares to provide additional income toward elimination from the total deficit the proportionate part of said total which may be properly assignable to coach service. However, we are not here called upon to make that finding. The petitioners are not before us for the purpose of further increasing their total revenues or to obtain authority to augment revenue from coach fares which as stated above for the three primary trunk lines was less than one-half of the amount received in 1942 from all passenger operations and approximately nine per cent of their aggregate Railway Operating Revenues. Petitioners' purpose in seeking our approval to increase their intrastate coach fares from 1.65 cents to 2.2 cents per coach passenger mile is clearly stated by Counsel on page 35 of the transcript as follows:

> [fol. 180] "If the Commission please, I would like to say that we have shown very frankly the earnings of these carriers that petition here, and we want to make it plain that we don't consider this strictly a revenue case. We feel that the passenger business has not been bearing its fair share of the transportation burden and that the passenger business is entitled to earn its fair share of the transportation burden and that the passenger business is entitled to earn its fair share of the burden, carry that fair share. We are seeking only to put the fares in North Carolina on the basis of the interstate fares and on the same basis as

carried now in a good many of the southern states generally and by a number of railroads in all of their southern state operations. The Illinois Central, for example, they have had this 2.2 fare since the beginning, interstate and intrastate, and our neighbor state of Virginia, they have had it, the Norfolk & Western, and C. & O., and all of the lines in North Carolina except the Southern and Seaboard—I mean in Virginia except the Southern and Seaboard, Coast Line and perhaps one or two others already had this basic fare of 2¢ plus the increase, which made it 2.2. We are simply asking to put the fares in North Carolina on what we may call the general normal basis, which the I. C. C. has recognized as recently as April 6 as a reasonable fare for coach transportation."

Ex Parte No. 148 was reopened by order of the Interstate Commerce Commission on January 4, 1943. The mimeographed report in the reopened proceeding, decided April 6, 1943, embracing in a general revenue sense, the rates, fares and charges for all railroad services of the entire country, directs particular attention to the matter of coach fares in the Southern Region. There on sheet 26, the ultimate paragraph, reference is made to the increase on October 1, 1942, in the interstate basic coach fare from 1.5 cents per mile (minimum reasonable) to the maximum basis of [fol. 181] 2 cents found reasonable in *Passenger Fares and Surcharges*, plus the 10 per cent increase. Further reference is made to the fact that at time of hearing, February 2, 1943, in reopened Ex Parte No. 148, the increased coach fares were effective intrastate in only one southern state. Quoting from sheet 25, under the caption "Passenger Fares", the Commission stated: "We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular resulting fare or fares". Thus it clearly appears that recognition by the Interstate Commerce Commission of 2.2 cents per passenger mile as reasonable as recently as April 6, referred to by Counsel, for coach transportation was upon a record largely dedicated to the broad general question of total revenues from all operations and at a time of rapidly changing conditions when the full impact on income from passenger operations could not have been determined from interstate coach fares then so recently and drastically increased in the South for civilian

travel and less recently reduced for furloughed members of the armed forces below the apparent minimum reasonable basis of 1.5 cents per coach passenger mile without distinction in *Passenger Fares and Surcharges,* 214 I. C. C. 174, decided February 28, 1936.

Undoubtedly petitioners desire to drastically increase their intrastate civilian coach fares is solely for the purpose of bringing such fares to the level of the corresponding interstate fares. We have carefully examined the evidence which of necessity perhaps is largely related to the results of interstate operations, and upon that evidence we are persuaded that present intrastate coach fares should not be increased to the full extent sought, but that some degree of increase has been justified, the precise extent of which [fol. 182] may not be properly determined without fully investigating the lawfulness of interstate coach fares in the Southern Region under existing conditions, both as to the reasonableness of the basic one-way coach rate for civilian travel of 2.2 cents per mile, and the lawfulness of the relation of that fare to the round-trip basis of 180 per cent of the one-way fare, as well as any other distinctions in coach fares which have not had affirmative approval of the Interstate Commerce Commission on a recent record devoted to these issues.

The chief traffic witness presented by petitioners stated that he knew of no justification for maintaining intrastate coach fares of 1.65 cents per passenger-mile while interstate fares to and from points within the state are based on 2.2 cents per mile. This witness also testified that a combination of intrastate and interstate fares over border points could be used to defeat the through interstate fares to and from points within the State, illustrating the manner of constructing such combinations by several concrete examples. We are not unmindful that a substantial difference in the interstate and intrastate coach fares, or a disparity in service conditions as between standing and seated passengers and between charges for one-way and round-trip fares, are undesirable in the absence of justifiable circumstances and may not meet the tests of certain provisions of the law. Nor may we in good conscience lose sight of the requirement that the standard to which these minor attributes are adjusted must also withstand the test of the law. The witness referred to also testified that the North Carolina lines are not seeking to take advantage of the present war

conditions but are asking authority to increase intrastate coach fares to the same basis "specifically" approved by the Interstate Commerce Commission. We do not agree [fol. 183] that the interstate basic coach fare of 2.2 cents per mile per passenger in the Southern Region has been approved by the Interstate Commerce Commission, any more specifically than a fare of 1.65 cents, see that Commission's reports, *Passenger Fares and Surcharges*, 214 I. C. C. 174, 255, decided February 28, 1936 and *Eastern Passenger Fares in Coaches, Ex Parte 123*, 227 I. C. C. 17, 18, decided April 4, 1938:

"* * * There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents."

"* * * PASSENGER FARES AND SURCHARGES, 214 I. C. C. 174, decided February 28, 1936. At that time the regular fares in eastern territory, except these of the Norfolk and Western Railway Company, were on the basis of 3.6 cents per mile in both coaches and pullman cars, plus a pullman surcharge approximating 0.4 cent per mile, which was the basis established following the general increases in 1920. The pullman surcharge was found to be unreasonable and was required to be eliminated. *The basic fares then in effect generally in southern and western territories and on the Norfolk & Western were found not to be unreasonable or otherwise unlawful. In general, they were 1.5 cents in coaches*, and 3 cents one way, 2.5 cents round trip limited to six months, and 2 cents round trip limited to 15 days in pullmans, in the South; and 2 cents in coaches, and 3 cents one way, 2.5 cents round trip limited to six months, and 2 cents round trip limited to 10 days in pullmans, in the West. [fol. 184] "The prescribed maximum fares became effective in eastern territory on June 1, 1936, and have since been maintained. *On November 15, 1937, the southern carriers increased their basic fare in coaches*

from 1.5 to 2 cents, and on December 15, 1937, both the western and the southern carriers increased their pullman round-trip fare of 2 cents to 2.25 cents, the time limit in the West being extended from 10 to 30 days and that in the South continuing at 15 days. In the West, among other departures from the basic fares, intermediate-class or tourist fares are maintained on the basis of 2.25 cents per mile, one way and 190 per cent thereof, round trip, limited to 30 days; also round-trip coach fares on the basis of 190 per cent of 2 cents per mile limited to 30 days. *No round-trip coach fares are maintained in the South or in the East.*"

The increase by southern carriers to 2 cents on November 15, 1937, referred to in the foregoing quotation and as hereinbefore pointed out, later reverted to 1.5 cents. In *Georgia Public Service Comm.* v. *United States,* 283 U. S. 765; the United States Supreme Court held:

> "When State rates are assailed on the ground that they result in undue prejudice to interstate shippers or discrimination against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level."

Also in *Va. Corp. Comm.* v. *A. & R. R. R.,* 136 I. C. C. 173, 180; the Interstate Commerce Commission stated:

> "Where the issue is between intrastate and interstate rates and undue preference of intrastate shippers or commerce and undue prejudice to interstate shippers [fol. 185] or commerce, it is necessary in the first instance to determine whether or not the offense is caused by intrastate or interstate rates. The Commission cannot require intrastate rates to be raised above a maximum reasonable level in order to cure a disparity with interstate rates, and where intrastate rates have been fixed by order of a State Commission they cannot be increased by carriers without an order from this Commission, such situation being recognized in Section 13 (4) of the Act."

Perhaps petitioners' contention that present interstate coach fares have recently and specifically met with such affirmative approval by the Interstate Commerce Commis-

sion and with such finality under the above doctrine is an attempt to demonstrate an assumed fixed substantive right under case law to a civilian coach fare of 2.2 cents per mile. If that hypothesis is correctly stated, we are not thereby greatly disturbed, for it does not, as a principle of law, guide us away from conclusions on the evidence. Justice in the matter is our deep concern, and from the evidence at hand we are convinced that civilian coach fares to, from and within the State of North Carolina, based on 2.2 cents per passenger mile, does now and will continue to do so under contemporary conditions, exceed a maximum reasonable level. At 248, I. C. C. 545, 607; *Increased Railway Rates, Fares, and Charges, 1942*, it is stated:

> "A Nation-wide increase, chiefly on a percentage basis, is now proposed. Some important rates average somewhat higher than those effective in 1929, while others are generally lower. Obviously there can be no detailed ironing out of inequalities in this proceeding."

[fol. 186] Surely the drastic over-all interstate increase in Southern Region and the proposed intrastate increase from 1.5 cents to 2.2 cents or 47 per cent per coach passenger mile is unique and constitutes an inequality. The income statistics as of December 31, 1942, before us in this proceeding, do not reflect the major increase of 33⅓ per cent except to a very limited extent. Nevertheless, the results are so favorable as to take the matter out of the "revenue case" category. The general public interest is affected by the policy of developing, coordinating and preserving a national transportation system, adequate to meet the needs of commerce, the Postal Service and the national defense, but a disproportionate share of the expense should not be borne by the civilian coach passenger part of the public whose cost of travel is further enhanced by a Federal tax of ten per cent.

The change proposed in round-trip first class fares is of minor importance and does not indicate a shift in the ratio of sleeping and parlor car service expenses to revenues. The drastic increase in coach fares creates a presumption that a corresponding rise in coach service operating expenses has developed. However, if such a change has taken place it is but lightly touched upon in the record.

The proposed changes in round-trip first class fares and the rule for disposing of fractions as stated in paragraph VIII of the petition and in paragraphs III and IV herein will be approved. A different conclusion has been reached with respect to the proposed increases in civilian coach fares. In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together, but upon a record such as that before us in this proceeding where the standard appears improper, it does not mean that we are bound [fol. 187] to perfunctorily endorse and adopt that standard. Our course is to first pursue the administrative remedy that is open to us and we shall move in that direction by addressing a petition to the Interstate Commerce Commission, seeking an investigation by that body of the interstate civilian coach fares to and from the State of North Carolina.

It is ordered, That the changes in round-trip first class fares and the method for disposing of fractions in computing both coach and first-class round-trip fares, also for one-way coach fares, as herein proposed by petitioners, by and they are hereby approved.

It is further ordered, With respect to increases as proposed by petitioner in one-way and round-trip civilian coach fares, that a determination of the precise extent to which such fares may be lawfully increased, be and the said determination is hereby deferred until the administrative remedy referred to in the foregoing report has been exhausted.

By the Commission.

This 8th day of July, 1943.

(S.) Stanley Winborne, Chairman; Fred C. Hunter, Commissioner; R. G. Johnson, Commissioner. (Seal.)

[fol. 188] At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 13th day of October, A. D. 1943.

No. 29036

North Carolina Intrastate Coach Fares

Order Instituting Investigation

It appearing, That a petition has been filed on behalf of the Aberdeen and Rockfish Railroad Company and other common carriers by railroad operating in the State of North Carolina, averring that in *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the Commission authorized certain increases in interstate rates, fares, and charges throughout the United States, which have been established; that on August 1, 1942, the order therein was modified so as to authorize the railroads operating in southern passenger association territory to apply the increase of 10 percent approved in said order to a basic coach fare of 2 cents per mile on the lines of said railroads pursuant to which authority fares for interstate transportation of 2.2 cents per mile for one-way travel in coaches were established on October 1, 1942; that on the latter date petitioners established, among others, fares for interstate transportation of 1.98 cents per mile for round-trip travel in coaches; and that the North Carolina Utilities Commission by order dated July 8, 1943, refused to authorize or permit the application to the transportation of passengers traveling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on October 1, 1942;

It further appearing, That petitioners allege that the refusal of the North Carolina Utilities Commission to permit the application to the transportation of passengers traveling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on October 1, 1942, causes undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, and undue, unreasonable, and unjust discrimination against interstate commerce;

And it further appearing, That said petition brings in issue fares and charges made or imposed by authority of the State of North Carolina:

It is ordered, That in response to said petition an investigation be, and it is hereby, instituted, and that a hearing be held therein for the purpose of receiving evidence from the respondents hereinafter designated and any other persons interested, to determine whether the refusal of the North Carolina Utilities Commission to authorize or permit the application to the transportation of passengers trav- [fols. 189-190] eling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons of localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges, shall be prescribed to remove such unlawful advantage, preference, prejudice, or discrimination, if any, as may be found to exist.

It is further ordered, That all common carriers by railroad operating within the State of North Carolina subject to the jurisdiction of this Commission be, and they are hereby, made respondents to this proceeding; that a copy of this order be served upon each of said respondents; and that the State of North Carolina be notified of this proceeding by sending copies of this order and of said petition by registered mail to the Governor of said State and to the North Carolina Utilities Commission at Raleigh, N. C.

It is further ordered, That notice of this proceeding be given to the public by depositing a copy of this order in the office of the Secretary of the Commission, at Washington, D. C.

And it is further ordered, That this proceeding be assigned for hearing at a time and place hereafter to be named.

By the Commission, Division 1.

W. P. Bartel, Secretary. (Seal.)

[fol. 191] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC 29036

NORTH CAROLINA INTRASTATE COACH FARES

Raleigh, North Carolina, December 28, 1943.
9:30 a.m.

Before John P. McGrath, Examiner.
Met pursuant to notice.

APPEARANCES:

Charles Clark, c/o Southern Railway Company, 15th & K Sts., Washington, D. C., appearing for Southern Railway Company and other respondent railroads.

Frank W. Gwathmey, Shoreham Building, Washington, D. C., appearing for A. C. L. RR. Co. and S. A. L. Ry., respondents.

M. D. Miller, Room 5319, Federal Office Building No. 1, Washington 25, D. C., appearing for Price Administrator and Economic Stabilization Director, protestants.

Fred C. Hunter, c/o North Carolina Utilities Commission, Raleigh, North Carolina, appearing for North Carolina Utilities Commission, protestants.

H. M. Nicholson, Director of Traffic, North Carolina
[fols. 192-193] Utilities Commission, Raleigh, North Carolina, appearing for North Carolina Utilities Commission, protestants.

F. C. Hillyer, 227 W. Forsyth Street, Jacksonville, Florida, appearing for North Carolina Utilities Commission; Charlotte Shippers & Mfgrs. Assn.; North Carolina Division of Travellers Protective Association of America, protestants.

[fol. 194] PROCEEDINGS

Exam. McGrath: The Interstate Commerce Commission has assigned for hearing at this time and place, Docket No. 29036, entitled North Carolina Intrastate Coach Fare.

Who appears for the respondents?

Mr. Clark: Charles Clark, address care of Southern Railway, 15th & K Streets, Washington, D. C., for the Southern Railway System Lines and other respondents generally.

Mr. Gwathmey: Frank W. Gwathmey, Shoreham Building, Washington, D. C., appearing for Atlantic Coast Line Railroad Company and Seaboard Air Line Railway.

I may say, Mr. Examiner, that representatives of the passenger traffic and accounting departments of these lines are present at the hearing, but I take it that it is unnecessary to enter formal appearances for them.

Exam. McGrath: You are representing them as counsel, are you not?

Mr. Gwathmey: Yes, sir.

Exam. McGrath: It isn't necessary then. Who appears for the North Carolina Commission?

Mr. Hillyer: Judge F. C. Hunter, a member of the North Carolina Utilities Commission, and H. M. Nicholson, Director of Traffic of the North Carolina Utilities Commission, and F. C. Hillyer, 227 West Forsyth Street, Jacksonville, Florida, for the North Carolina Commission. We appear [fol. 195] also for the Charlotte Shippers and Manufacturers Association and for the North Carolina Division of the Travellers Protective Association of America.

Exam. McGrath: Any other appearances?

Mr. Miller: M. D. Miller, Room 5319, Federal Office Building No. 1, 2d and D Streets, SW., Washington, D. C., appearing for Price Administrator and Economic Stabilization Director.

Exam. McGrath: Any further appearances? (No response.)

This is an investigation instituted by the Commission in response to a petition filed by common carriers by railroad operating in North Carolina alleging violation of Section 13 (4) of the Interstate Commerce Act to determine whether the refusal of the North Carolina Utilities Commission to authorize or permit the application to the transportation of passengers traveling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges shall be [fol. 196] prescribed to remove such unlawful advantage, preference, prejudice, or discrimination, if any, as may be found to exist.

Respondents may proceed.

Mr. Clark: The Examiner will understand in entering my appearance generally, I did so because Southern Railway is acting as chairman of the proceeding in this state. As you well know, we divide these hearings up.

May it please the Examiner, before proceeding, I would like to call attention to two or three formal matters. I would like first to have the petition that we filed in this case made a part of the record to serve as a pleading on behalf of the petitioners. Attached to that petition is the order of the North Carolina Commission in its Docket 2789, dated July 8, 1943, which is a action of the state that gives rise immediately to the rates or fares to which this 13th Section proceeding is directed. That copy is attached to it, and I would like to offer that order of the North Carolina Commission in evidence by reference. Do you want to give it a number?

Exam. McGrath: Merely as part of the pleadings, you mean?

Mr. Clark: No, as part of the evidence.

Exam. McGrath: Is there objection to that being considered part of the record by reference?

Mr. Hillyer: We have no objection to its being received [fol. 197] as the document which was filed but not as proof of the facts stated in the petition.

Mr. Clark: If the Examiner please, we have got to make proof that these rates are imposed upon us by the action of the state, and I have to offer and put in the record as evidence the order of the State Commission. It is done in every case.

Mr. Hillyer: We have no objection to the order of the North Carolina Commission being placed in evidence, but you offered the petition.

Mr. Clark: I didn't offer it. I said that the petition would serve as a pleading. I thought I made myself clear on that.

Exam. McGrath: Is there any objection to that procedure?

Mr. Hillyer: No, sir.

Exam. McGrath: That may be done.

Mr. Clark: The petition was filed on July 22, 1943. I would like to also offer by reference the order of the Commission of October 13, 1943, instituting the present proceeding, Docket 29036. That may be done by reference, I take it.

Exam. McGrath: It is the Examiner's understanding that that is part of this proceeding.

Mr. Clark: I don't know whether it is or not. It has never been tested. I would like to be careful.

[fol. 198] Exam. McGrath: Any objection to that?

Mr. Hillyer: No.

Exam. McGrath: All right. That will be satisfactory.

Mr. Clark: I would like to introduce by reference notice from the Secretary of November 1, 1943, setting the case for November 29th; similar notice of November 9th, cancelling and resetting the case for December 13th, and a similar notice of December 4th, cancelling that assignment and setting it for Raleigh here today, December 28th. May they be offered and made a part of the record by reference?

Exam. McGrath: Any objection?

Mr. Hillyer: No objection.

Exam. McGrath: That may be done.

Mr. Clark: Mr. Miller, I believe you are willing to stipulate with me that O. P. A. received notice of the proceeding before the North Carolina Commission in Docket No. 2789 and appeared before them represented by Mr. Harvey P. Schneiber.

Mr. Miller: I frankly don't know what notice we received. I will see if the file shows.

Mr. Clark: You appeared, didn't you?

Mr. Miller: No, I didn't appear.

Mr. Clark: Did a representative of the O. P. A. appear?

Mr. Miller: What was the date of that hearing?

Mr. Clark: May 20th, as I recall.

Mr. Miller: Frankly I don't know from personal knowl-

[fol. 199] edge. Let me find my file, and I will see. I don't want to be stubborn, but I don't want to go off half cocked.

Mr. Hillyer: The record for the Commission shows the appearance by Mr. Schneiber for Mr. Burns and the Office of Price Administration.

Mr. Clark: You will agree to that, won't you, Mr. Miller?

Mr. Miller: Yes. I have a copy of the notice here.

Mr. Clark: Then your answer is that you agree to that?

Mr. Miller: Yes.

Mr. Clark: Similarly you have notice of the 13th Section proceeding now on trial, and you are here?

Mr. Miller: We received a copy of the petition.

Mr. Clark: On behalf of the petitioners for the respondents, let me say we consent and are glad to have a representative of the O. P. A. with us at this time.

I would like to turn to the report and order of the North Carolina Commission of July 8, 1943, and refer the Examiner and opposing counsel to the statement in the report reading: "But that some degree of increase has been justified, the precise extent of which may not be properly determined without fully investigating the lawfulness of interstate coach fares in the Southern Region."

Again in the report it was stated in the North Carolina Commission's report: "Our course is to first pursue the administrative remedy that is open to us and we shall move [fol. 200] in that direction by addressing a petition to the Interstate Commerce Commission, seeking an investigation by that body of the interstate civilian coach fares to and from the State of North Carolina."

The final paragraph in the report: "With respect to increases as proposed by petitioner in one-way and round-trip civilian coach fares, that a determination of the precise extent to which such fares may be lawfully increased, be and the said determination is hereby deferred until the administrative remedy referred to in the foregoing report has been exhausted."

In that connection, I wish to introduce by reference the advice from the Secretary of the Commission to Chairman Winborne, Chairman White, and to O. P. A. dated October 11th that the petition for such an investigation of coach fares that they had filed had been denied. May I have that offered in evidence by reference?

Exam. McGrath: Is there objection to that?

Mr. Hillyer: No, sir.

Exam. McGrath: It is received.

Mr. Miller: I would like to make the observation on that point, Mr. Examiner, that the petition in that case was not, or the petitions were not denied unanimously.

Mr. Clark: That is a matter of proof, and you can't challenge the action of the Commission because of some [fol. 201] minority vote.

Mr. Miller: The Commission can take official notice of its own actions and its own minutes.

Exam. McGrath: I think it will do that whether attention is called to it or not.

Mr. Clark: Mr. Gwathmey suggested we should offer also in evidence those three petitions for the investigation of coach fares and the replies that the railroads made to them so as to complete the record entirely. In that connection it should be understood we are not offering those papers as proof of the facts stated therein but as pleadings as Mr. Gwathmey suggested.

Mr. Miller: I fail to see the relevance of those documents as pleadings.

Exam. McGrath: What is the relevancy of that?

Mr. Gwathmey: Mr. Examiner, the purpose in offering those petitions and the answers is to prove in this record the fact that the petitions were filed and also to prove the contents of the petitions. In other words, it is to prove the arguments that were advanced by the O. P. A. and the two state Commissions who filed the petitions. We want the opportunity to show that those arguments were advanced in support of the petitions.

Mr. Clark: Mr. Examiner, I withdraw the statement about them serving as pleadings. We will offer them as [fol. 202] evidence along lines suggested by Mr. Gwathmey.

Exam. McGrath: By reference, you mean?

Mr. Clark: Yes, sir. Everybody has them. There is no use to encumber the present record.

Exam. McGrath: Is there objection to it?

Mr. Miller: No objection.

Mr. Hillyer: Understanding they are offered as evidence that such pleadings were filed but not as proof of the facts contained in the allegations.

Mr. Clark: In so far as they go to prove the statements Mr. Gwathmey just made, they are being offered as evidence not as pleadings.

Exam. McGrath: In the absence of objection, they will be received as such.

Mr. Clark: In view of what I have said, may it please your Honor, I am going to ask whether or not it is in order for the North Carolina Commission to now enter a further order in its Docket 2789, authorizing the increase of coach fares that were sought before it; that is to say the 2.2 level. May I call on the Commission to say whether or not the North Carolina Commission will now enter such an order, either amending the present order or enter a new one, any

way it may see fit to bring about the result of 2.2 intrastate in North Carolina?

Exam. McGrath: That is the one-way fare, isn't it?

[fol. 203] Mr. Clark: Yes, sir.

Exam. McGrath: The round-trip fare is somewhat less, and that is for three months limit?

Mr. Clark: 180 per cent of the 2.2 for the full distance.

Exam. McGrath: Off the record.

(Discussion off the record.)

Mr. Hillyer: May we go on the record? Am I correct in my understanding that the issues in this proceeding are those raised by the order of the Interstate Commerce Commission, dated October 13, 1943? Is that understanding correct?

Mr. Clark: It is not up to me to answer.

Mr. Hillyer: Is my understanding correct?

Exam. McGrath: Yes. That is my understanding. The issues are those set forth in that order, but the question of Mr. Clark didn't relate to that. It is a sort of preliminary proposition, as I understand it, that may possibly avoid further hearing in this Docket No. 29036.

Mr. Hillyer: Having the understanding as to what the issues are in this case and where they rise, I will state that the North Carolina Commission through one of its Commissioners will state its position fully at the commencement of our testimony. He will then answer your question.

Exam. McGrath: Respondents may call their first witness.

Mr. Hillyer: I say that for the reason that Mr. Clark's reference to certain portions of the decision must be read [fol. 204] in connection with the whole which will be explained in some detail by a member of the Commission of North Carolina.

Mr. Clark: It is obvious, Mr. Examiner, that the North Carolina Commission is unwilling to now change its order and authorize 2.2 requested, so we will proceed.

Mr. Hillyer: I can't agree with Mr. Clark's position. The door of the North Carolina Commission is open, and they have to certain carriers who have made inquiry stated that the door is open. It has never been foreclosed, and carriers have not gone back to the North Carolina Com-

mission and asked for any further hearing or any further proceedings before it.

Exam. McGrath: You may proceed.

Mr. Hillyer: May I inquire about two or three points before the testimony is commenced? Is my understanding correct that the reasonableness of the interstate coach fares is not in issue in this proceeding?

Exam. McGrath: Of the interstate?

Mr. Hillyer: Yes.

Exam. McGrath: You are asking me that question?

Mr. Hillyer: Yes, because the North Carolina Commission asked the Interstate Commerce Commission to investigate the interstate fares on trains going through North Carolina, and that petition was denied, so it is my understanding that reasonableness of the interstate coach fares is not in issue in this proceeding.

[fol. 205] Exam. McGrath: Well, it is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise, it is not in issue. It is not subject to attack, and the parties are at liberty to show what facts they have and their position on that particular question.

Mr. Hillyer: Is my understanding correct that under the Commission's order, there is no issue here with respect to compensation for movement of troop trains and troops by the Federal Government? Mr. Clark, is that your understanding?

Mr. Clark: I don't see that I have to answer that question. The issues have been framed and stated by the Examiner and straightened out on further inquiry by Mr. Hillyer. I suggest you ask the Examiner what is involved in this case.

Exam. McGrath: I read the issues. That is as far as I intend to go.

Mr. Hillyer: Mr. Gwathmey, could you state your understanding with respect to transfer of troop movement and troop trains?

Mr. Gwathmey: My understanding is that there has been no proposal to make any increase in the fares charged to soldiers and other military people while traveling on furlough or in the fares charged to the Government for the

transportation of troops. My attention has been called to [fol. 206] the fact, Mr. Examiner, that certain troop movements do take place under the standard fare. Of course, the standard fare is proposed to be increased; that is the coach fare, and to that extent, there would be an increase in the charge for the transportation of troops. I was talking about special fares made to Government people.

Mr. Clark: What Mr. Gwathmey has in mind is the one and a quarter cents per mile fare that we will explain if we ever get to our case for furlough travelers.

Mr. Hillyer: One more point, Mr. Examiner, am I correct in the understanding that the fares for travel in pullman cars or parlor cars is not in issue in the proceeding?

Mr. Clark: This is confined to coach fares, as it is stated.

Exam. McGrath: That is the Examiner's understanding—coach fares only.

Proceed.

T. C. Blackwell was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Have you been sworn?

A. Yes, sir.

Q. Give your name and residence, please.

A. T. C. Blackwell, Charlotte, North Carolina.

Q. What position do you hold with the Southern Railway System.

[fol. 207] A. General superintendent of transportation.

Q. How long have you held that position?

A. Five years.

Q. Prior to that time, had you been in the transportation department of the Southern Railway?

A. Yes, sir, for over 35 years.

Q. Would you very briefly give us some of the more recent positions you have held and the time?

A. Three years as superintendent of the Atlanta division, seven years as superintendent of the Memphis Division; six years as trainmaster; three years as chief dispatcher, and other minor positions.

Q. As general superintendent of transportation, would you very briefly give us the scope of your duties and authority?

A. Supervising train operation, making schedules, and distribution of equipment.

Q. The physical running of the trains?

A. Yes, sir.

Q. Is that freight and passenger?

A. Yes, sir.

Q. Is that confined to what we call eastern lines?

A. Yes, sir.

Q. How many miles does your territory comprise?

A. Approximately 2200 miles.

Q. How many miles comprise the Southern Railway proper?

[fol. 208] A. 6611 miles.

Q. We have what is known as the Southern Railway System. Will you tell us the lines of railroad comprising the system?

A. The C. N. O. & T. P.; A. G. S.; G. S. & F.; N. O. & N. E.; and the Southern Railway.

Mr. Clark: Those initials, Mr. Examiner, are Cincinnati, New Orleans & Texas Pacific; Georgia Southern & Florida; New Orleans & Northeastern; Alabama Great Southern, and, of course, the Southern Railway.

By Mr. Clark:

Q. What is the total mileage of the System?

A. Approximately 7200 miles.

Q. How many states or in what states do the System Lines operate?

A. District of Columbia, Virginia, North and South Carolina, Georgia, Mississippi, Louisiana, Indiana, Illinois, Kentucky, Tennessee, and Florida.

Q. In a word, you cover the territory east of the Mississippi and south of the Ohio and Potomac Rivers; is that correct?

A. Yes, sir.

Q. How many miles of railroad has the Southern Railway in the State of North Carolina?

A. 1202.

Mr. Clark: Mr. Examiner, I am going to make some reference to troop trains, and it is going to be very gen-

eral. I may say it is put in this way advisedly because we [fol. 209] have been asked not to go into these military affairs.

By Mr. Clark:

Q. Tell me approximately, Mr. Blackwell, the number of special troop trains that the Southern operates per month.
A. 350 to 450.

Mr. Hillyer: On the system?
Mr. Clark: Yes.
The Witness: Made up with from six to twenty cars.

By Mr. Clark:

Q. Let's take a particular month, say, November, 1943. Have you that record?
A. Yes, sir.
Q. How many trains did you operate?
A. 353 special trains.
Q. How many men and how many cars?
A. 4,114 cars, transporting 101,098 men.
Q. During that month, did you have occasion to operate extra cars for the exclusive use of troops on your regular scheduled trains?
A. Yes, sir, 1,178 cars were operating.
Q. How many men did you transport in those cars?
A. 42,163.
Q. Have you kept a tabulation month by month since as far back as April, 1941? If so, please give me the number of special troop trains, the number of men and the number of cars on those trains.
[fol. 210] A. 8,867 trains and 136,783 cars, transporting 3,498,923 men.
Q. Do you have occasion to operate your trains in two sections?
A. Yes, sir.
Q. Have you any convenient record there at hand for any recent month for the number of trains you have operated in two sections?
A. During the month of November, 325 regular trains operated in two sections.
Q. When you have two sections, it means another locomotive and another set of equipment and another train crew?

A. Yes, sir.

Q. These figures that I have been getting you to answer about are system figures, I take it?

A. Yes, sir.

Q. That brings the question whether or not the Southern Railway operates these several lines of railway that you named together as a single operate unit or not?

A. Yes, it does.

Q. In respect to lines east that is in your immediate charge in that section of the road, the Southern Railway proper mileage predominates?

A. Yes, sir.

Q. That is the line from Washington down through the Carolinas and through this territory?

[fol. 211] A. Yes, sir.

Q. Now, coming to the State of North Carolina, you say you have 1202 miles, wasn't it?

A. Yes, sir.

Q. Let's break it down into your principal main line mileage, and then we will say your secondary main line and then your branch line. Will you break it down to those three divisions?

A. Of the North Carolina mileage, approximately 200 miles is or comprises double track main line; approximately 650 miles make up the secondary main line, and the remaining 300 miles might be properly classified as branch lines.

Q. In the operation of your trains into, out of, across North Carolina, and within the state, I want to ask you do you give any consideration in the physical operation to state lines.

A. None whatever.

Q. On the trains that you operate, is any distinction made with respect to inter and intrastate passengers?

A. None.

Q. Do both classes of travel travel in the same cars, coaches, and the like?

A. Yes, sir.

Q. Baggage handled in the same baggage car?

A. Yes, sir.

Q. Those trains are handled by the same crews irrespective of inter or intrastate?

[fol. 212] A. Yes, sir.

Q. And obviously over the same track?

A. Yes, sir.

Q. Same general supervision?

A. Yes, sir.

Q. In your experience, can you turn back to a North Carolina operation, physical operation of a passenger train that you could say was solely intrastate? See if you can think of one.

A. Only on some special occasions for a football game or something like that, which would be operated purely for intrastate travel.

Q. For example, to the University of North Carolina or Duke, you might have a special movement from Charlotte up to a football game?

A. Yes, sir.

Q. I am speaking of the regular set up schedules that these passenger fares apply on and on runs published in schedules. Can you think of one of those that are wholly intrastate?

A. The only one that could possibly be considered as operating wholly for intrastate travel is the train between Wilkesboro and Winston-Salem, but there is hardly a trip, if ever, that there are not some interstate passengers on that train.

Q. Does that train carry mail and express?

A. Yes, sir.

[fol. 213] Q. Would that be strictly intrastate or would that embrace interstate as well?

A. Interstate.

Q. Then your answer is that you can't find in your recollection a single instance of a wholly intrastate operation?

A. Except for special events like football games.

Q. At the moment, you are not operating any of those kind, are you?

A. No, sir.

Q. Trains are of two kinds, through trains and local trains. Would you point out the distinction between them?

A. A Local train is one that stops at all the stations from terminal to terminal, and a through train is one that makes a limited number of stops.

Q. Let's take your main line operation, Mr. Blackwell, north and south through the state. I have in mind Danville at one end and Spartanburg at the other. That is where you run north and south through the state?

A. Yes, sir.

Q. How many passenger trains have you—well, make it to Charlotte because that is where your Columbia train branches off going to Augusta—how many trains have you north of Charlotte on that stretch?

A. Nine in each direction, a total of eighteen.

Q. Eighteen trains daily north of Charlotte?

[fol. 214] A. Yes, sir.

Q. South of Charlotte, how many?

A. Eight in each direction, sixteen.

Q. Of course, two drop off there because of the train going down to Columbia?

A. Yes.

Q. And the main line goes on to Atlanta?

A. Yes, sir.

Q. On your Goldsboro-Greensboro operation, I believe you have three trains each way daily, is that right?

A. Yes, sir.

Q. How is it going to Winston-Salem?

A. How many to Winston-Salem?

Q. Greensboro to Winston-Salem, you have three there daily?

A. We have five daily.

Q. The about the only other service that I recall is that little line from Charlotte up towards Statesville and Taylorsville. Is that a round trip daily or what kind of service?

A. Double daily, a train in each direction.

Q. And then on the line from Spartanburg up to Asheville, you hit the North Carolina line, how many have you in there?

A. Two in each direction.

Mr. Clark: I may say, Mr. Examiner, that we have been through a number of these cases, and last evening when Mr. Blackwell was talking to me about the case, he had his [fol. 215] secretary, and I dictated, or he dictated rather a statement in an effort to shorten this of some of the difficulties that are encountered at the present time on passenger train operations. This was dictated by me to his secretary after a conference with him. Is that correct, Mr. Blackwell?

The Witness: That is correct.

Mr. Clark: I did it in order to shorten the record. These details take a long time to explain, so if it is agreeable, I would like to offer this statement as an exhibit and save

having to copy it in the record. It is just one page, and otherwise, it would take several pages. I can serve copies on all counsel.

Exam. McGrath: Let me see a copy.

Mr. Clark: (Handing Examiner copy of paper) That was done in an effort to save time. It can be filed as an exhibit. We did that in the Florida East Coast case.

Exam. McGrath: Off the record.

(Discussion off the record.)

Exam. McGrath: Is there any objection?

Mr. Hillyer: North Carolina objects on the grounds that the statement of fact which is presented contains statements as to cost. The witness has shown no qualifications to offer testimony as to the cost of transportation.

Exam. McGrath: It will be necessary to develop that evidence in the regular way, Mr. Clark.

[fol. 216] Mr. Hillyer: I could state some other objections.

By Mr. Clark:

Q. Mr. Blackwell, you have told us about the physical operations and the com-ingling of interstate and intrastate passengers. May I ask you whether or not that situation similarly exists with respect to the other rail lines operating in North Carolina on such roads as the Coast Lines, Seaboard, and the like?

A. So far as I know.

Q. In your experience as operating man, are you in contact with the operating officers of those other roads from time to time?

A. Frequently.

Q. Would your information and knowledge be sufficient for you to say that they do similarly com-ingle passengers on their trains like you do on yours?

A. Yes, sir.

Q. With respect to the general operating conditions in the state, is anything especially different between your operation and theirs unless it be the mountainous territory that we serve in the western part of North Carolina?

A. Similar except for the mountainous territory that they don't have.

Q. Mr. Blackwell, will you please take the question of the difficulties, say the unusual conditions that confront you

on the physical operation, leaving out for the moment troop [fol. 217] train operations, and tell us at the present time what is the situation with respect to any unusual operations.

A. Southern Railway System Lines and other North Carolina lines are confronted with unusual difficulties and expense in connection with passenger operations under present day conditions. The increased passenger travel requires additional coaches and additional sleepers. In many cases it is necessary to run trains in two sections and doubleheaded.

Mr. Hillyer: I object to any statement as to cost.

Mr. Miller: It appears as though he is reading from the statement. It seems that the Commission's rules require that we be furnished copies of prepared testimony.

Mr. Clark: I furnished copies, and they didn't want it.

Exam. McGrath: Give it to them.

The Witness: Frequently one or two cars added to a train will cause that train to be doubleheaded or run in two sections.

Over the mountainous territory between Salisbury and Asheville and between Spartanburg and Asheville pusher service is necessary, sometimes requiring three engines to get the train over the heavy grades in those territories.

So far as the Southern Railway is concerned, the cost of handling passengers in the State of North Carolina is greater than in the other states served by the Southern Railway because of the heavy grades in the mountainous sections.

[fol. 218] Mr. Hillyer: I object to any testimony as to cost.

Exam. McGrath: You are speaking about passenger trains now?

The Witness: Yes, sir.

Mr. Hillyer: I object to any testimony as to cost.

Exam. McGrath: Objection overruled.

The Witness: The grade on Saluda Mountain is the heaviest east of the Rockies.

On all through trains two conductors and two porters, and sometimes three, are regularly assigned. That is because of more coaches to work. The forces in the ticket offices have been greatly increased and in the larger passenger terminals additional stationmasters, platform forces, and switching crews have been assigned. Roadway, me-

chanical, and equipment repair forces have been increased, as the heavy load and constant use causes abnormal wear and tear.

Dining car expenses have been substantially increased because of the necessity for providing additional diners on long trains, doubling the crews to take care of extra sections causing heavy overtime payments and the greatly increased cost of supplies. Wages have increased by leaps and bounds, and another increase is pending.

Mr. Hillyer: I object to that unless he is qualified as to wages and as to what the increases are.

Mr. Clark: You can cross-examine him.

[fol. 219] Mr. Hillyer: I can object.

Mr. Clark: Here is a man running a railroad. He knows if he puts on more men he knows it increases the cost.

Exam. McGrath: The objection is overruled with the understanding the witness will state the basis for his testimony about the cost.

Mr. Clark: You said wages have increased. Proceed.

The Witness: Wages have increased by leaps and bounds, and another increase is pending.

The cost of coal has increased 96.7 per cent in the past five years. The cost of all passenger train supplies has increased in proportion.

Mr. Hillyer: I object to that. The witness has shown no qualifications as to the cost of coal.

Exam. McGrath: What is the basis of that statement?

The Witness: That is information furnished me by the fuel department.

Exam. McGrath: Objection overruled.

Mr. Clark: Go ahead.

The Witness: Equipment rentals have greatly increased due to the necessity of using equipment owned by other roads.

By Mr. Clark:

Q. I want you now to take up the question of the unusual conditions you have encountered by reason of troop movement.

A. The railroads encounter——

[fol. 220] Mr. Hillyer: He has testified about troop movements, and they are not in issue in this case.

Mr. Clark: We are burdened with running a railroad, and we are handling passengers, and it is part of the expense of doing business.

Exam. McGrath: Just so you don't duplicate what is in the record, it is all right.

Mr. Miller: Mr. Examiner, I haven't heard any testimony yet showing any of these troop movements in intrastate commerce. As a matter of fact, the testimony so far is that it is not.

Exam. McGrath: You can ask that on cross-examination. Proceed, Mr. Blackwell.

The Witness: The railroads encounter unusual difficulty and expense incident to the movement of military personnel. The greatest difficulties in handling troop trains are the added number of trains and the additional yard expense, interference with normal operations, delay to other trains on line of road meeting and being passed by these troop trains. A considerable item is terminal expense in delivering troop trains to connecting lines by switch crews, sometimes involving a haul of ten to twelve miles. Most of the camps are located outside of yard limits, and because of labor agreements the trains are handled between the camps and terminals by road crews. It is necessary at times to move crews under pay one hundred miles or more from [fol. 221] their home terminal to handle a troop train a short distance. No small item of expense is incurred in moving empty equipment to the entraining point, which often has to be done on a fast schedule, and in moving the empty equipment away from the camp after detraining. The icing, watering, and cleaning of these cars involves considerable expense and interferes with regular train schedules and causes delays, overtime, and extra fuel consumption.

Mr. Miller: Do I understand that testimony with respect to troop movement was introduced over my objection? Has my objection been overruled?

Exam. McGrath: I didn't understand you made any objection to that.

Mr. Miller: All with respect to troop movement, yes, sir.

Exam. McGrath: The objection is overruled.

The Witness: Some of these costs, which are due to troop train movements, are charged to freight expenses; for example, yard expense in handling troop trains to and from connections, overtime caused to freight trains and yard

engines due to delay by troop trains, interference with normal yard operations resulting in delays and additional per diem expense, and extra pusher service are charged to freight expense.

By Mr. Clark:

Q. Mr. Blackwell, let's take conditions, operating conditions—by that, I mean the physical operating conditions in Virginia, South Carolina, Georgia, and of course, going [fol. 222] on the other side over into Tennessee—I want to ask you whether or not aside from the mountainous territory right down the Blue Ridge Mountains if there is any difference in the physical operations in those several states from the North Carolina situation?

A. None.

Q. Throughout the Southern Territory by and large that your railroad serves, are the physical operations substantially uniform, as I said, except from the mountainous situation in particular sections of particular states; is that true?

A. They are.

Q. We have there largely the same general climatic conditions, the same general kind of people, the same general kind of territory; is that right?

A. Generally, yes, sir.

Q. Mr. Blackwell, I advised with one of our people to be sure I haven't overlooked anything, and he called my attention to the fact that in discussing the lines of railroad I discussed with you, I perhaps failed to get you to explain the service on the Murphy branch. I frankly overlooked it in covering it. What kind of service do you operate on the Murphy branch?

A. We have a passenger train in each direction.

Q. Each day?

A. Yes.

Q. With what railroad does it connect at Murphy? [fol. 223] A. Mr. Clark, I can't answer that question. That is not in my territory.

Q. It does connect with L & N. It shows here on the map.

A. Yes.

Q. I believe that covers your entire line. I don't think I have overlooked any. You have got a little branch com-

ing from Henderson down to Toxaway. That is also in the state?

A. Yes, sir.

Q. I don't believe they operate passenger service on that at all?

A. No passenger service.

Mr. Clark: I think that is all, if the Examiner pleases.

Cross-examination.

By Mr. Miller:

Q. I believe you stated that the only purely intrastate trains that you knew of were these special excursion trains like to and from football games.

A. Yes, sir.

Q. Do you include any troop movement within that classification?

A. From one camp to another in North Carolina?

Q. Yes.

A. We have some of those.

Q. You mentioned that, I believe, since April you have had 8,878 train movements.

Mr. Clark: April, 1941, Mr. Miller.

[fol. 224] The Witness: It is April, 1941.

Mr. Miller: I stand corrected.

By Mr. Miller:

Q. About how many of those were intrastate trains within the State of North Carolina?

A. I haven't that information.

Q. Are those intrastate movements within North Carolina occasional or frequent or just what is the situation?

A. Very rare indeed.

Mr. Miller: That is all I have.

By Mr. Hillyer:

Q. Mr. Blackwell, in making the statement that wages have increased by leaps and bounds, did you mean that total payment for wages, or did you mean wages paid for a specific class of service?

A. Wages in general.

Q. You meant total cost of your total expenses for employees?

A. Yes, sir.

Q. You didn't mean that would be one successive different increase for different class of service?

A. No; wages for all employees.

Q. Do you know anything about the prices paid for coal, fuel?

A. Only from information furnished me by the fuel department.

Q. You stated that equipment rentals have been increased. Do you mean that the rate paid for cars of a certain type owned by others has been increased, or do you mean that [fol. 225] the total amount of equipment rents is increased?

A. Total amount of equipment rents.

Q. You said that some of the costs of troop train movements are charged to freight expenses. Have you any knowledge of accounting on which that was based?

A. Any knowledge of accounting?

Q. Yes.

A. No.

Mr. Hillyer: Mr. Examiner, I would like to renew my objection to any testimony of this witness dealing with costs on the ground that he has not shown to be qualified.

Exam. McGrath: Your objection will be noted on the record.

Mr. Hillyer: No further cross.

Exam. McGrath: Any questions on redirect?

Mr. Clark: One or two.

Redirect examination.

By Mr. Clark:

Q. Mr. Blackwell, according to the press, the Government has taken over the railroads, and the press has authorized some increases to trainmen and enginemen already. Have you noted that?

A. Yes, sir.

Q. I think that is perhaps a matter of general knowledge, but as this record will be closed before we can make any reference to it, I think I am justified in referring to that [fol. 226] fact.

Mr. Hillyer's questions, Mr. Blackwell, intimated the increase in wages you had in mind was those related to mere increase in number of employees. I will ask you whether or not there has been increases in rate of pay?

A. There has been very substantial increases and gradual increases.

Q. Then your increase in expense due to wage increases were not confined solely to the result of employing more men?

A. No, sir.

Q. There is one thing I overlooked asking you. Have you had occasion to shorten dispatching districts because of increased traffic and operating conditions?

A. Yes, sir.

Q. Can you give us one example of how that works so the record may be clear?

A. Formerly three dispatchers handled the line from Monroe to Spencer and from Greensboro to Goldsboro. We have split that dispatching district and put on three men to handle the line from Greensboro to Goldsboro, and the other three operate from Spencer to Monroe.

Q. The dispatcher is set up in three tricks in twenty-four hours of eight hours each?

A. Usually, yes.

Q. And here you have shortened the dispatching district? [fol. 227] A. Yes, sir.

Q. Was that to increase efficiency or why did you do that?

A. Because of the increased number of trains.

Mr. Clark: That is all, sir.

Exam. McGrath: Any further questions? (No response.) You are excused.

(Witness excused.)

Exam. McGrath: We will take a brief recess.

(A short recess was taken.)

Exam. McGrath: You may proceed.

Mr. Clark: I would like to put Mr. Blackwell back on the stand for a question or two.

T. C. Blackwell testified further as follows:

Redirect examination.

By Mr. Clark:

Q. When I asked you a moment ago whether or not you knew what we connected with at Murphy, did you have in mind that I was talking about the passenger train schedule or the physical railroad?

A. Passenger train schedule.

Q. You know L & N connects with us at Murphy?

A. Everybody knows that.

Mr. Clark: That is all.

Exam. McGrath: Any questions?

Mr. Hillyer: No.

[fol. 228] Exam. McGrath: You are excused.

(Witness excused.)

Mr. Clark: I will now call Mr. Barry to the stand. Mr. Examiner, through oversight—Mr. Barry thought I had it, and I thought he had it—we failed to bring a supply of the Southeastern Junction point map that has been put in in these cases. Mr. Hillyer, I am sure you are familiar with it, and Judge, I am sure you are. I would like to ask the privilege of furnishing opposing counsel copies after the hearing.

Exam. McGrath: Any objection to that being done?

Mr. Nicholson: I think we have a few at the office.

Exam. McGrath: If there is no objection, and there is none stated, permission to file that map within ten days is hereby granted. Send copies to the parties, and please refer in your letter of transmittal to the page of the testimony on which permission is granted.

Mr. Clark: Within ten days, I am afraid I won't have the testimony.

Exam. McGrath: You can state you haven't got it.

(Map to be filed within ten days by applicant.)

E. E. BARRY was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Will you give your name and town you live in, please?
[fol. 229] A. E. E. Barry, Washington, D. C.

Q. What railroad are you connected with?

A. Southern Railway System, assistant passenger traffic manager.

Q. At Washington?

A. At Washington.

Q. Will you briefly outline the nature and scope of your duties?

A. The final authority in the passenger traffic department of the Southern Railway rests in our office in Washington, with the general supervision of all matters in connection with passenger traffic.

Q. In the passenger work, does your work relate to rates and tickets and service?

A. Rates, tickets, fares, and all matters connected with passenger traffic.

Q. How long have you held that position?

A. Since November 1, 1937.

Q. Prior to that time, had you been in the employ of the passenger department of the Southern?

A. I have been in the passenger department of the Southern since January, 1911 continuously.

Q. Would you say in various positions in the passenger department?

A. In various positions and located at various points.

[fol. 230] Q. Would you describe the area generally known as Southern Passenger Association Territory?

A. The Southern Passenger Association generally speaking is territory east of the Mississippi River and south of the Ohio and Potomac.

Q. The fares that we are dealing with here, are they the coach fares, pullman fares or both, or what?

A. Dealing only with coach fares one-way and round-trip.

Q. The one way is an effort to investigate the 1.65 with a view to increasing it to 2.2; is that right?

A. To 2.2, the interstate level.

Q. The round-trip, I believe you answered while ago was 80 per cent?

A. 180 per cent of the one-way for distance travel and it provides uniform limit of three months.

Q. So the pullman fares are not in issue here?

A. They are not involved.

Q. With respect to troop movements, please explain to us whether or not the increase from 1.65 to 2.2 would have any bearing on the amount of transportation the Government would pay for if it is a troop movement?

A. Only to a very, very limited extent in intrastate travel.

Q. I didn't confine you to intrastate. Take anywhere in Southern territory.

A. It would not.

[fol. 231] Q. Wait one minute. I don't think you get my question. If you have to pay 1.65 per mile, that gives you a total charge; if you have to pay 2.2 that gives you a total charge. That is what is known, I take it, as the commercial rate?

A. Correct.

Q. Does the Government get anything off from that for troop movements?

A. On all Government traffic, the railroads give an allowance of five per cent.

Q. That is aside from any land grant?

A. That is entirely separate from any land grant, and where land grant is applicable, there is a reduction of fifty per cent and further allowance of three per cent for the actual amount of the commercial fares.

Q. So that if you assess the commercial rate less five per cent, the Federal Government troop movement is affected by the increase from 1.65 to 2.2?

A. Yes, sir.

Q. So your answer that it would not was a misunderstanding of the question?

A. Yes, I misunderstood the question.

Q. There is a ticket fare known as one and a quarter cents per mile for furloughs that you will describe later. Is there any proposal to change or increase that?

A. There is no proposal to change that fare.

[fol. 232] Q. There is no proposal here to investigate or change the five per cent or any other deduction that you might make for the troop movements?

A. None whatever.

Q. Nothing to change the land grant?

A. No, sir.

Q. But in dealing with the land grant rate in so far as you calculate the charge on the higher 2.2 and then deduct the land grant, to that extent the Federal bill would be affected?

A. It would, yes.

Q. Mr. Barry, we have—I want to ask you whether or not you testified when this same question was before the North Carolina Commission in Docket 2789?

A. I did.

Q. Did you testify in any of the other state proceedings?

A. I testified in the Alabama state proceeding, the Mississippi state proceeding, the Louisiana state proceeding.

Q. Did you go to Kentucky?

A. And Kentucky.

Mr. Clark: Mr. Examiner, the history of the passenger fares is somewhat complicated, and in order to have it exactly right, we will produce this in statement form. I can either file it as an exhibit or I can have the witness read it, furnishing opposing counsel copies, whichever you prefer. It is thirteen pages. If we introduce it as an [fol. 233] exhibit, we will give opposing counsel time to sit down and read it and then cross-examine. We have been over it so many times that I thought you could read it faster than it can be typed.

Exam. McGrath: Off the record.

(Discussion off the record.)

Exam. McGrath: On the record. Is there any objection to have it go in as an exhibit?

Mr. Hillyer: I suggest it be made an exhibit.

Exam. McGrath: Do you agree to that, Mr. Miller?

Mr. Miller: Yes, if it is the same thing we have had before. I would like to ask some questions about it.

Exam. McGrath: You are free to ask any questions you wish, and if you find argument in there, I will be glad to have it stricken.

Mark that for identification as Exhibit No. 1.

(Respondent's Exhibit No. 1, witness Barry, marked for identification.)

By Mr. Clark:

Q. I hand you a paper which we have marked Exhibit No. 1, consisting of thirteen pages. I will ask you whether or not that is true and correct without going through the formality of reading it.

A. It is.

Q. You are familiar with it?

A. I am.

Q. You are prepared to stand cross-examination on it if [fol. 234] the gentlemen wish to ask you anything?

A. Yes, sir.

Mr. Clark: In that exhibit, Mr. Examiner, at Page No. 10 on the top line, you will note the exhibit number. That will be exhibit No. 2, which is a four page statement, which we would like to distribute now. Will you gentlemen kindly insert No. 2 at page 10?

(Respondent's Exhibit No. 2, witness Barry, marked for identification.)

By Mr. Clark:

Q. This Exhibit No. 2 which we have marked, I want to ask you whether or not that is true and correct.

A. Yes.

Mr. Clark: Come on down to the middle of Page 10 in Exhibit 1 and insert Exhibit No. 3, which is a three page exhibit. Will you kindly distribute that exhibit.

(Respondent's Exhibit No. 3, witness Barry, marked for identification.)

By Mr. Clark:

Q. Is that exhibit true and correct?

A. Yes.

Q. Mr. Barry, you will note on Exhibits 2 and 3 here, we have the name of Witness Aiken. Who is Mr. Aiken?

A. He is assistant passenger traffic manager of the Southern Railway System, Atlanta, Georgia.

Q. Will you tell us why he is not here today?

A. Due to illness and under doctor's orders he is con- [fol. 235] fined to his home and unable to be out.

Q. For that reason you came?

A. That is true.

Exam. McGrath: I don't find that these exhibits 2 and 3 contain tariff references.

Mr. Clark: I am going to ask about that.

By Mr. Clark:

Q. Mr. Barry, they are taken from your passenger tariff. If you can't give them to us, may we insert your tariff references from which these exhibits were taken?

A. These fares were taken from published fares and tariffs currently outstanding. There are several tariffs involved in that.

Exam. McGrath: You are unable to give them yourself?

Mr. Clark: Yes, sir.

The Witness: I can supply that during the day.

Mr. Clark: We can get that without difficulty, and we can put that in.

Unfortunately Mr. Aiken was taken sick, and I didn't like to ask that this be postponed. Mr. Barry has testified in some other cases, and he and Mr. Aiken are interchangeable witnesses for that matter.

Exam. McGrath: Those references should be both as to tariffs containing the fares and distances likewise so if there is any controversy about that.

Mr. Clark: In other words, the distance table and fares [fol. 236] unless shown in both tariffs, you want both of them.

The Witness: All right.

By Mr. Clark:

Q. Mr. Barry, what would you say in your opinion would be a fair average distance for an average coach haul within the State of North Carolina? Can you give us some estimate on that?

A. Intrastate in North Carolina, approximately thirty miles.

Q. Do you have at hand any computation or record from which you could give it accurately?

A. No.

Q. So your estimate of it is the best that is available?

A. Best available.

Q. In the event the present 1.65 rate within North Carolina should be increased to 2.2 cents per mile, what effect,

if any, would that have in your opinion on the traveling public?

A. I do not think it would have any effect whatsoever.

Q. I mean with respect to traveling or not traveling is what I am speaking of.

A. I do not think it would have any effect.

Q. Of course, the man that had to pay more, it would have that much effect on him, but what I am asking you about is whether or not it would have any effect on causing him to travel or not to travel.

A. It would not have any effect, I do not think.

Q. In other words, the slight increase would not keep [fol. 237] him off the train?

A. No. The amount involved would be so small that I don't think it would have any influence on him.

Q. Suppose, for instance, it did keep a few passengers off, would that be to your advantage or to your hurt?

A. I think that would be more than offset by the revenue you get out of the passengers that were traveling.

Q. As I recall it, years ago there used to be a higher charge made when a person didn't have a ticket and paid the conductor a cash fare than he had purchased at the ticket window. Do you remember whether or not that used to exist?

A. That formerly did exist. It was a so-called penalty charge for cash fares paid on the train, which was I think fifteen cents.

Q. Today do you have any such so-called penalty fare for cash fare paid on trains?

A. We do not.

Q. So a man can buy from the conductor or ticket agent, if there is a ticket agent at the same rate?

A. At exactly the same price.

Exam. McGrath: Would the proposed increase in the intrastate fares be likely to divert passenger travel to busses or other means of transportation?

The Witness: I don't think so, Mr. Examiner.

By Mr. Clark:

Q. Mr. Barry, come back to your Exhibit No. 3, please. [fol. 238] In the course of your work as assistant passenger traffic manager, do you have occasion to travel on the passenger trains of the company?

A. Yes; over the entire system.

Q. Over the years of your service, haven't you been continually traveling on trains?

A. Yes, sir.

Q. Would it be fair to say that you are familiar with the ways of the traveling public?

A. I think I am qualified to say that.

Q. With that thought in mind, I wish you would look at your Exhibit 3 and tell me whether or not passengers do travel between the several stations shown on that exhibit, Exhibit No. 3—in other words, Asheville to Athens, Tennessee?

A. Yes, sir.

Q. Asheville to Knoxville?

A. Yes, sir.

Q. Asheville to Henderson?

A. There is substantial travel between all points shown on that exhibit.

Q. In making that answer, I take it you do not undertake to identify a particular passenger on a particular train or a particular date?

A. No; that would not be possible.

Q. Turning to your Exhibit No. 2, that is offered as [fol. 239] examples of an opportunity to defeat the through interstate rate by buying to a point and rebuying or not buying at all as the case may be. I will ask you whether or not from your general knowledge of conditions in Southern Territory, including North Carolina, you would say there is opportunity for persons to so defeat the through rate?

A. Yes, sir.

Q. By and large again, without undertaking to identify an individual passenger or individual train or individual date, would you say whether or not persons travel between the stations shown on Exhibit No. 2?

Mr. Miller: I would like to have the witness qualified before he answers that question as to whether or not he knows and as to where he derived the source of that knowledge.

Exam. McGrath: He may answer the question and give the basis for his answer.

The Witness: What was the question?

Exam. McGrath: I will ask the reporter to read the question.

(Question read by the reporter.)

The Witness: Yes, sir.

Mr. Miller: I have no objection to that.

Exam. McGrath: You base your answer on what—your general knowledge?

The Witness: I base that answer on general knowledge [fol. 240] of the mannerisms and practices of the traveling public, and information that comes to me from ticket offices, conductors, and in some instances, from the passengers themselves.

By Mr. McGrath:

Q. From a passenger traffic standpoint, I want to ask you whether or not any distinction is made in the handling of inter and intrastate passengers into and out of the State of North Carolina or within the State of North Carolina.

A. None whatever.

Q. Did you hear Mr. Blackwell's answers?

A. I did.

Q. If I went over the same ground in that respect with you, would your answers be the same?

A. It would.

Mr. Clark: I merely ask it that way to save time, Mr. Examiner.

By Mr. Clark:

Q. Turning to the general conditions from a passenger traffic man's standpoint on the railroad within the State of North Carolina, are they by and large the same; are they different, or if so, in what respect aside, of course, from the mountainous territory in western North Carolina?

Exam. McGrath: You mean as between interstate passengers?

Mr. Clark: As between the railroads.

The Witness: They are similar and the same.

[fol. 241] By Mr. Clark:

Q. Is it a matter of aid and convenience in the sale of tickets or cash fares to have a single ticket rate as distinguished from two different rates?

A. Very much, particularly under conditions as they exist today.

Q. Do you have long lines of people at a great many of your ticket windows, particularly at the larger stations?

A. At the principal stations, that is a daily occurrence.

Q. Do you have any difficulty in getting competent ticket sellers to handle increased travel?

A. It has reached the point that we cannot find competent ticket sellers.

Q. You have had to call on ladies to become ticket sellers?

A. Call on ladies and endeavor to train them.

Q. With respect to the lifting of tickets on your trains, you recall Mr. Blackwell referred to two conductors and a conductor and a helper. Is that by reason of increased traffic?

A. Yes, sir.

Q. Where a conductor has to stop to collect a cash fare, is he facilitated or delayed by having two sets of ticket fares?

A. He is handicapped very seriously in his tasks in operations.

Q. Mr. Blackwell told us that there were nine trains in each direction or eighteen in all in North Carolina north of [fol. 242] Charlotte. Those are generally known as the through passenger trains?

A. That is right.

Q. Like 37, 38, and 31, 32, and those trains?

A. That is right.

Q. I want to ask you whether or not those trains run through the state without stopping or do they make a substantial number of stops within the state. Give us some idea about that.

A. On all of those stops—on all of those trains, a number of stops are made in the State of North Carolina.

Q. Would I be safe in saying there are six or seven stops on each of those trains within the state?

A. That is correct. There are six or seven.

Q. In addition, do you have local trains that make all of the stops?

A. We do have local trains that make every station stop.

Q. From a passenger traffic man's standpoint, tell us whether or not in your best judgment or opinion the present passenger service could be furnished to the people of North Carolina if it had nothing to rely on but the purely intrastate passenger traffic?

A. I don't think that it would be possible to furnish anything like the present passenger service if it was entirely dependent upon intrastate passenger travel.

[fol. 243] Q. Were there any particular examples on these exhibits 2 or 3 that you wish to call attention to? Some are mentioned in your Exhibit No. 1. If there are any you wish to stress, we will be glad to have you do it.

A. I should like to point out——

Q. Say which exhibit you are on.

A. On Exhibit No. 3, Item 3, we show there that a passenger from Asheville, North Carolina, to Chattanooga, Tennessee, traveling interstate on a basic fare of 2.2 cents would pay $5.32; a passenger from Asheville, North Carolina, to Durham, North Carolina, traveling intrastate on a basic fare of 1.65 cents, would pay $4.20; therefore, the intrastate passenger traveling six miles more than the interstate passenger would actually pay $1.12 less for his transportation.

Q. And that is in coach service?

A. That is, of course, coach service, and similar items could be multiplied almost indefinitely.

Q. Mr. Barry, on the first page that is marked No. 2 of Exhibit 1, you say effective August 26, 1920, by order of the Interstate Commerce Commission, there was a 20 per cent increase in fares. Have you at hand the citation to the Commission's report on that? We didn't seem to show it in the exhibit. If you haven't got it, why just say so. Have you got the volume and page number handy?

A. No, sir, I do not have that.

[fol. 244] Mr. Clark: Mr. Examiner, I think that increased rate of 20 per cent was in Ex Parte 74. That is my recollection of what it is, but it is omitted from the text.

Exam. McGrath: Would you check and verify that?

Mr. Clark: I would like the privilege of verifying that and furnishing citation.

Exam. McGrath: Can you do that during the course of the hearing, or do you want additional time for that?

Mr. Clark: I will try to do it during the course of the hearing.

Exam. McGrath: If you can't, supply it within ten days, furnishing all parties with a copy of your letter.

Mr. Clark: I will give it to you, I am sure, during the day.

We offer, if the Examiner please, Mr. Barry's exhibits 1, 2, and 3.

Exam. McGrath: Exhibits 1, 2, and 3, are received in evidence.

(Respondent's Exhibits Nos. 1, 2, and 3, witness Barry, received in evidence.)

Mr. Clark: That is all on direct.

Cross-examination.

By Mr. Hillyer:

Q. Mr. Barry, in one of Mr. Clark's questions, he used the words or the word, "mountaineous" in relation to North Carolina. Isn't it a fact there are mountains in most of [fol. 245] the Southern States; namely, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Tennessee, and Alabama?

A. Outside of east Tennessee, they are not comparable with western North Carolina.

Q. Are there not mountains in those various states?

A. I would say yes.

Exam. McGrath: Are those mountains traversed by the railroads, all of them?

The Witness: No, but the foothills are. The mountains probably cause some grades, but not anything compared with the results of the grade in western North Carolina section.

By Mr. Hillyer:

Q. In your Exhibit No. 1 there is reference to the special facilities and types of equipment used for what we might call the deluxe trains, streamliner trains. On the Southern Railway's streamlined trains through service through North Carolina, how many stops are provided where a North Carolina passenger can travel intrastate?

A. I believe it is six. I will give it to you exact—six within the State of North Carolina, and we might say seven, figuring Danville, Virginia, is right on the state line.

Q. On any of those trains, do you reserve space for intrastate movements?

A. Yes, indeed.

Q. Between what points?

[fol. 246] A. Between any two points within the State of North Carolina.

Q. Do all of your trains stop at all of those points?

A. All trains do not stop at all points.

Q. What is your best train, what is the name of it?

A. We think we have a number of best trains.

Q. Which of your trains makes the fewest stops in North Carolina?

A. Trains 47 and 48 and 37 and 38.

Q. At what points in North Carolina do they pick up passengers and carry them to another point in North Carolina and let them off there?

A. Well, speaking of northbound travel, we would pick up passengers at Gastonia, Charlotte, Salisbury, Spencer, High Point, Greensboro. We would pick up at either of those points and let them off at any other point in North Carolina.

Q. Don't you have some trains where you don't make all of those stops and where you don't sell local tickets between nearby points?

A. No.

Q. Generally what time do your fastest trains between Washington, say, and the southern cities pass through these North Carolina stations?

A. At various hours throughout the twenty-four hour period.

Q. Aren't most of them night trains through North Carolina?

A. Some of them are night trains. I know of no section [fol. 247] with the same distance in the south that has more train service than is offered by the Southern Railway on its main line through the State of North Carolina.

Mr. Hillyer: Mr. Clark, will you have other witnesses for the Coast Line or Seaboard, or may I inquire of him?

Mr. Clark: Yes.

Mr. Gwathmey: We have witnesses for the Coast Line and Seaboard.

By Mr. Hillyer:

Q. Is any of your deluxe equipment used in an easterly-westerly direction in North Carolina?

Mr. Clark: Would you mind explaining to the witness what you mean by deluxe equipment?

Mr. Hillyer: I referred to his Exhibit No. 1 where he describes these streamliners and special facilities provided.

Mr. Clark: The streamliner is a train called "Southerner." We will stipulate it runs north and south and does not run east and west, but on the east and west run, we have some pullman equipment which is just as deluxe.

Exam. McGrath: The witness can answer that.

Mr. Clark: I think I can admit something that will save a lot of time, which is usually done, Mr. Examiner.

By Mr. Hillyer:

Q. Mr. Barry, where did you get that thirty mile average haul figure which you spoke of in North Carolina?

A. From the statistics of sometime back and common knowledge of travel in general over our railroad.

[fol. 248] Q. Was that made from any careful examination of the statistics of fares within the state?

A. Other than an inquiry as to whether there had been any substantial change in the distance intrastate passengers were moving who were ticketed through our offices.

Q. You haven't shown any of these short distances on your exhibits two or three, have you?

A. Yes. We show a number of fares there intrastate in North Carolina which are short distances.

Q. You don't show any for anywhere near as short as thirty miles, do you?

A. No. We couldn't undertake to show that information.

Mr. Hillyer: That is all.

Exam. McGrath: Any further questions on cross-examination?

Mr. Miller: I have a few.

By Mr. Miller:

Q. In your Exhibit No. 1, Mr. Barry, you stated that you, rather you state that during the years 1932 and 1933 the Southern Lines made certain experiments to attract additional traffic in competition with motor vehicles?

A. Yes, sir.

Q. And then in December, 1933, you established the low experimental fare generally throughout the South?

A. Yes.

[fol. 249] Q. Do I understand from that that you considered the experiment something of a success as far as attracting the traffic is concerned?

A. We were impressed with the experiment and desired to continue it.

Q. Why did you desire to continue it?

A. To try to arrive at some definite conclusion?

Q. What was the conclusion you were trying to arrive at?

A. After some time we went back to two cents.

Q. Were you trying to arrive at the fare which would produce the greatest total revenue for the railroads? Was that what you were driving at?

A. We were striving to put some passengers on our train that the private automobile and the bus had almost taken away from us entirely.

Q. Were you trying to arrive at the fare which would produce the greatest total revenue?

A. The greatest passengers and greatest revenue.

Q. Then you just remarked that from November 15, 1937, to January 14, 1939, you went back to the two cents coach fare. Why did the railroads not continue that two cents fare beyond January 14, 1939?

A. We felt that further experimentation was in line.

Q. For the same purpose?

A. Yes.

[fol. 250] Q. Do you know which produced the greatest total revenue, the two cents fare or the cent and a half fare?

A. May I suggest that that question is a little misleading and that conditions that were obtaining would have a very substantial influence on the result?

Q. Which did produce the greatest total revenue during those times in which it was tried?

A. I think for a period there that one did and for probably another period, the other did.

Q. Do you mean by that that one and a half cents fare produced the greatest total revenue while it was being used?

A. When the one and a half cent was first established, it resulted in a substantial increase in the number of passengers handled and revenue; likewise, when the two cents fare—that is, when we went back to the two cents fare at the beginning, the increase continued.

Q. You say at the beginning. Toward the end, was there a discouragement of traffic?

A. To the end it was falling off.

Q. Was it for that reason you went back to the cent and a half fare?

A. That is right.

Mr. Miller: That is all I have.

Exam. McGrath: Any further questions on cross-examination?

(No response.)

[fol. 251] Any questions on redirect?

Mr. Clark: No questions.

Exam. McGrath: You are excused.

(Witness excused.)

W. E. Buechler was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Have you been sworn?

A. Yes.

Q. Will you give your name and what city you reside in?

A. W. E. Buechler, Atlanta, Georgia.

Q. What connection, if any, have you with the Southern Railway System Lines?

A. I am chief clerk to the auditor of master accounts.

Q. Located at Atlanta?

A. Yes.

Q. How long have you held that position?

A. I have been in that position five and a half years.

Q. Prior to that time, had you been for some time in the service of the company?

A. Continually since 1916.

Q. Has that been in the audit of passenger fares and tickets mainly?

A. Entirely.

Q. Would you briefly outline what was your office, the [fol. 252] auditor of passenger accounts, was it?

A. Yes.

Q. The auditor of passenger accounts?

A. Yes.

Q. In his office, what reports do you get in, and what do you do? Give us an idea of what that office does?

A. We receive the collection of tickets taken up by the conductors on our trains; we receive reports of cash fares collected; and we receive reports from account of all tickets sold both local and interline.

Q. Is that the office of permanent record on the Southern Railway, the final record of those transactions?

A. Those documents rest with us.

Q. Did you have occasion at my request over long distance telephone on Friday before Christmas to get up some data with respect to ticket sales?

A. I did.

Q. I hand you a statement which I would like to have marked Exhibit No. 4.

(Respondent's Exhibit No. 4, witness Buechler, marked for identification.)

By Mr. Clark:

Q. I will ask you now whether or not that statement was prepared by you or under your direction in response to my request.

A. It was prepared under my direct supervision.

[fol. 253] Q. Are the data thereon shown true and correct?

A. Yes, sir.

Q. Will you please tell us how many clerks and the number of man hours they consumed in preparing the data on this exhibit?

A. We utilized the services of eighteen people, total man hours of approximately forty, to compile this data.

Q. Was Friday afternoon a normal work day, or was it a holiday being the afternoon before Christmas?

A. It was a holiday.

Q. These employees, these eighteen employees, were they volunteers to do this work?

A. Yes, sir.

Q. Did you pay them regular time, or did you pay them overtime, how did you fix that?

A. They will be paid overtime.

Q. Overtime basis?

A. Yes, sir.

Q. Mr. Buechler, I am going to ask you whether or not there has been any increases in forces in your auditor of passenger accounts office of recent times. Give us some comparative period, say previous to Pearl Harbor, just before the war, how many did you have?

A. Our normal auditing personnel was 96.

Q. 96 persons?

A. Prior to Pearl Harbor.

[fol. 254] Q. How many have you now?

A. Our payroll consists of 208 persons.

Q. Have you had labor turnover as reflected in the present number of 208?

A. We have had a very large turnover.

Q. Men drawn into the war service?

A. Out of our original office personnel, we have contributed forty-seven of our boys to the military service that were replaced in addition to expansion of forces.

Q. Can you conveniently and easily gather in employees to engage in this work that is done in your office?

A. We find it very difficult to obtain employees for this class of work.

Q. On the Exhibit marked No. 4 for identification, there is a column there headed "Tickets". Take the first example, Knoxville to Asheville, 141 tickets. Those are coach tickets which as I recall I asked you to get up?

A. Yes, sir.

Q. Does that mean that 141 persons, each one bought a ticket during the month of November, 1943, for travel from Knoxville, Tennessee, to Asheville, North Carolina?

A. That is correct.

Q. Would that answer be similarly true if I asked you about each of the other items under column headed "Tickets"?

A. It would.

[fol. 255] Q. Those are mileages between the stations, I suppose, as the statement indicates?

A. That is right.

Q. In handling the ticket reports and detail in your office, the auditing, is it a greater burden to your force, or is it a help to have two different ticket rates for coach travel?

A. It is a decided burden.

Q. Would you tell us why that is?

A. The necessity for maintaining two complete sets of tariffs, the additional filing facilities necessary to take care of those, and the exceedingly complicated situation that we are confronted with now in trying to train young girls with no experience, no basic experience in our work to become rate and division clerks.

Q. You told us it required the work of eighteen employees on Friday afternoon before Christmas to get up the data here. Would you, so that that may be understood, would you tell us briefly or describe what they had to do in going through the record to get out this data?

A. Our audit system has recently been centered, with the accounting office taking the responsibility of preparing reports from our accounts, which puts us on a unit basis, and it was necessary that we take the tickets sold by all of our agents at points named and actually scrutinize each of the tickets to determine the sales to these particular points.

[fol. 256] Q. Do you mean you had to go through the ticket stubs?

A. We had to thumb the ticket stubs physically to get this account.

Q. As most of these stations are rather large stations, was that an easy or laborious task?

A. It was a laborious task.

Mr. Clark: If the Examiner please, we would like to offer Exhibit No. 4.

Mr. Miller: Mr. Examiner, I don't see the relevancy of this exhibit.

Exam. McGrath: What is the purpose of the exhibit?

Mr. Clark: The exhibit is to show that persons traveling between these points, some paying interstate fare and some paying an intrastate fare, I have shown them in both directions so that you will have a man traveling into the state, and you will have one from a point in the state going to a point in the same state, or vice versa, leaving two common points—one goes to a point within the state and one goes to a point without. You can pick out any kind of example from it.

Exam. McGrath: With that explanation, the exhibit is received.

(Respondent's Exhibit 4, witness Buechler, received in evidence.)

Mr. Clark: That is all.

[fol. 257] Exam. McGrath: You may cross-examine the witness.

Mr. Hillyer: No questions.

Mr. Miller: No questions.

Exam. McGrath: You are excused.

(Witness excused.)

T. K. Lynch, sworn and testified as follows:

Direct examination.

By Mr. Gwathmey:

Q. Will you give your name, your residence, and railroad position?

A. T. K. Lynch, Wilmington, North Carolina, general passenger agent, Atlantic Coast Line Railway.

Q. Please describe briefly the nature of your duties and the extent of your jurisdiction on the Coast Line System?

A. Well, I am charged with jurisdiction over rates and fares in the general office there, and I would say that that about covers the whole thing.

Q. The head offices of the Atlantic Coast Line Railroad are located at Wilmington, North Carolina?

A. That is correct.

Q. You are in the head office?

A. That is right.

Q. Does your jurisdiction cover the entire system?

A. That is correct.

Q. Including lines in North Carolina?

[fol. 258] A. That is correct.

Q. Mr. Lynch, about how many miles of railroad does the Atlantic Coast Line have in North Carolina?

A. Approximately a little over a thousand miles.

Q. And, of course, it is a matter of common knowledge that the Coast Line operates in various other states. What states does it operate in?

A. Virginia and North Carolina and South Carolina, Georgia, Florida and Alabama.

Q. What in round figures was the total mileage of the System?

A. Around 5,000 miles.

Q. Can you briefly without necessarily referring to a map, can you briefly tell us where the lines of the Coast Line in North Carolina operate?

A. Well, their main line enters the state at just up above Weldon, North Carolina, and goes out down at Rowland, and we have a line that comes in from Suffolk, Virginia, that goes to Rocky Mount and several branches over in that vicinity that go to Plymouth and Kinston and Washington and Vandemere, and we also have a line from Wilson down to Wilmington and Wilmington to Sanford via Fayetteville and from Wilmington towards Florence, South Carolina, which passes out of the state just beyond Chadbourne.

Q. Generally speaking, do not the lines of the Atlantic Coast Line lie principally in the eastern part of North Carolina?

[fol. 259] A. That is correct.

Q. Mr. Lynch, have you prepared several exhibits which you desire to offer at this time?

A. I have, sir.

Q. Will you present them in order and have them identified?

A. The next exhibit is No. 5.

(Respondent's Exhibit No. 5, witness Lynch, marked for identification.)

Q. In order that this may be headed properly, describe it please.

A. This exhibit is a statement showing manner in which the lower basis of fares intrastate in North Carolina makes it possible for passengers to defeat the through published interstate fares.

Q. Mr. Lynch, do you wish to comment briefly on this exhibit?

A. I would, sir. Take the second case on there, Richmond to Wilmington, the one-way interstate coach fare is $5.43. Now, a passenger may buy to Rocky Mount and rebuy at that point at a total cost of $4.78, thereby saving 65 cents. Similarly, in the last instance, a passenger from Norfolk to Fayetteville, the one-way interstate fare is $4.58. A passenger may buy to Rocky Mount and rebuy at a total cost of $4.12, saving 46 cents.

Q. I think that is sufficient to illustrate the purpose of the exhibit, Mr. Lynch, but let me ask you is there anything

[fol. 260] in the world to prevent that passenger from getting off at Rocky Mount if he wants to do it and buying the ticket?

A. No, sir. He has ample time, around an hour, which is sufficient to buy him a ticket. He has to wait there anyway and the ticket agent, of course, doesn't know where he came from.

Q. The ticket agent can't tell whether he got on originally in Rocky Mount or whether he came from somewhere else?

A. That is correct.

Q. Let's take your next exhibit, Mr. Lynch. Which will that one be?

A. No. 6.

(Respondent's Exhibit No. 6, witness Lynch, marked for identification.)

The Witness: It shows Wilmington and Asheville there.

Q. Please explain what the purpose of that exhibit is.

A. The purpose of this exhibit is to show how the 1.65 fare in North Carolina intrastate results in a different fare via one route and via another route between the same points, the other route being an interstate route.

Q. In other words, you are showing now an instance where there are two routes between the same points, both points being located in North Carolina?

A. That is correct.

Q. One being an intrastate route and one an interstate route; is that correct?

[fol. 261] A. That is it.

Q. What does that show?

A. This shows fare by the interstate route is $7.33 and the fare by the intrastate route is $5.55, or a difference of $1.78.

Q. Has the fare via the interstate route been reduced to meet the fare via the intrastate route?

A. No, it has not. Ordinarily the fare via Goldsboro would be the same as via Columbia if the interstate and the intrastate coach fares were on a parity—in other words, in this instance, generally speaking, the fare would be equalized by both routes.

Q. Under existing conditions, you have a high[illegible]arge via the interstate route than by intrastate route; is that correct?

A: That is correct.

Q. Is there anything in the world to prevent a passenger from using or from traveling over the intrastate route?

A. No, sir.

Q. Do they do it?

A. They do do it to my knowledge. Probably there is one explanation that I should make. I probably should say there is very little difference in the time via interstate route and via the intrastate route. Via the interstate route, you depart from Wilmington around three in the after-[fol. 262] noon and reach Asheville around eleven in the morning, and on the intrastate route, you leave Wilmington around 3:30 in the morning and reach Asheville around nine in the morning.

Q. You have one more exhibit, have you not, Mr. Lynch?

A. Yes; I have.

Exam. McGrath: That is No. 7.

(Respondent's Exhibit No. 7, witness Lynch, marked for identification.)

By Mr. Gwathmey:

Q. What is your next exhibit, which we have asked to be marked for identification as No. 7?

A. This exhibit shows two instances where interstate passengers going to the same destination as the intrastate passengers and traveling approximately the same distance pays a higher fare. Take the first one, two passengers, one originating at Mullins, South Carolina, going to Hallsboro, North Carolina, for approximately forty miles, pays 92 cents, and the intrastate passenger from Wilmington to Hallsboro, approximately the same distance, pays 72 cents.

Q. Mr. Lynch, trains operate from Mullins to Hallsboro and also from Wilmington to Hallsboro?

A. Yes, sir, on the same line. One man would be going one way and the other, the other.

Q. You know that passengers do ride those trains?

A. Between these points, yes, sir.

Q. Have you one more exhibit?

[fol. 263] A. I have one more, sir.

Exam. McGrath: That will be No. 8.

(Respondent's Exhibit No. 8, witness Lynch, marked for identification.)

By Mr. Gwathmey:

Q. Mr. Lynch, will you please explain this exhibit?

A. This exhibit is related to the third one, except that it undertakes to show a case where both passengers travel on the same train and the same identical distance. The intrastate passenger pays $1.45 from Weldon to Smithfield, and the interstate passenger from Fayetteville to Florence pays $1.83.

Q. Do I understand you to say that those passengers may ride the same identical train?

A. That is correct, sir.

Q. They may sit in the same coach, may they not?

A. They may, yes, sir.

Q. Do you as a passenger traffic official know of any reason whatever why two men traveling on the same train, under the same conditions should be charged different fares?

A. I do not, sir.

Mr. Gwathmey: May we ask that exhibits that have been referred to and by this witness marked for identification Nos. 5 to 8, inclusive, be received?

Exam. McGrath: The exhibits will be received in evidence.

[fol. 264] (Respondent's Exhibits Nos. 5 to 8, inclusive, witness Lynch, received in evidence.)

Mr. Gwathmey: The witness is ready for cross-examination.

Cross-examination.

By Mr. Hillyer:

Q. On your Exhibit No. 6, is it not a fact that the distance from Wilmington to Asheville via the intrastate route is substantially shorter than via the interstate route?

A. I wouldn't say that is correct. I don't have the distance figures, but I can figure it out for you.

Q. It would be easy to compute that, knowing the rates, would it not, from the face of the exhibit?

A. That is right, yes.

Q. Isn't it a fact that the intrastate route schedule is considerably shorter than the interstate route schedule?

A. I would not say that is a fact, sir.

Q. Didn't the figures that you gave show that there would be about two hours difference, two hours earlier getting to Asheville?

A. That is correct, but it depends upon the definition of the word "considerably."

Mr. Hillyer: That is all I have.

Exam. McGrath: Any further questions?

Mr. Hillyer: No.

Exam. McGrath: Any questions on redirect?

[fol. 265] Mr. Gwathmey: No.

Exam. McGrath: You are excused.

(Witness excused.)

Exam. McGrath: We will recess until 2 o'clock.

(At 12:30 o'clock, p. m., a recess was taken until 2 o'clock, p. m.)

Afternoon Session. 2 p. m.

Exam. McGrath: The hearing will be resumed.

T. B. Hanes was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Will you give your name and residence, please?

A. T. B. Hanes, Washington, D. C.

Q. With what railroad are you connected?

A. Southern Railway System.

Q. How long have you been connected with the Southern, Mr. Hanes, over thirty years?

A. Since April 1, 1900.

Q. At the present time, what is your position?

A. I am special investigator for the Law Department.

Q. Would you very briefly tell us what you are called on from time to time to do in that connection, outline your duties?

A. Make special investigations where they reach the stage [fol. 266] to be handled by any member of the law staff, abandonments, things of that kind.

Q. Have you at my request made an investigation into the business concerns of particular industries that might have occasion to use passenger transportation into or out of the state as well as those traveling intrastate in North Carolina, have you done that?

A. I have made what I consider a very incomplete investigation because of the limited time.

Q. Do you recall when I first asked you to do this?

A. Last Thursday or Friday a week ago.

Q. In the course of that investigation, were you able to go to all the points, see all the people in person, or did you call into your assistance, other members of the Law Department staff?

A. I had to call in the assistanee of some half a dozen or more of our claim men scattered in different sections of the country, that is in North Carolina and around the state.

Q. Are those men members also of the staff of the law department of the Southern Railway?

A. Yes, sir.

Q. Did you see the exhibits that Mr. Barry put in, indicating ticket sales one point versus another?

A. Yes, sir.

Q. Did you see those exhibits offered by Mr. Buechler [fol. 267] along the same line?

A. Yes, sir.

Q. Of the actual ticket sales?

A. Yes, sir.

Q. Will you tell us the results of your investigation with respect to the industries or general business classifications—I don't know exactly how to put it—who use passenger transportation from time to time? Tell us, please, what you found.

A. To begin with, I have gotten a partial list of people who travel interstate into North Carolina for the purpose of selling goods or other businesses. As I said before, it is incomplete. I have classified them or rather divided them into the class of goods that was handled rather than by firms.

Q. In other words, fertilizer or plumber's goods, something of that kind?

A. That is true, and then I have gotten such information as I have been able to assemble in North Carolina of similar goods; that is to bring them into competition in North Carolina. That list is not as complete as the interstate list, but I have a good many concerns.

Q. Before taking that up in detail, let me ask you whether or not North Carolina as a state is not somewhat outstanding from the standpoint of having a large number of really good towns as distinguished from a few large cities. Is that true?

A. There is no other state in the south that is comparable [fol. 268] to North Carolina.

Q. Mr. Hanes, in that connection tell us whether or not you are a North Carolinian yourself and have some first-hand knowledge of this from long experience?

A. I was born and reared at Asheville, North Carolina. I have traveled every foot of rail or railroads the Southern has in North Carolina. I have driven all over it. I know the state pretty well—certainly from Raleigh west. East, I don't know it so well.

Q. In your duties up and down the line of the Southern Railway, have you occasion to travel the territory?

A. Yes, sir. During last year I traveled practically one-half the time.

Q. I didn't ask you, I believe, how long you held your present position as special investigator for the law department. How many years, do you recall?

A. Since 1925.

Q. I believe prior to that time you were connected with the claim department and held some other offices too.

A. Yes, sir.

Q. Take up the result of your investigation, after having given us that outline, and in your own way, tell us what you found about these industries, any way you care to put it.

A. I find a number of fertilizer companies located in different points who travel interstate into North Carolina [fol. 269] either by actual salesmen or by sales supervisors who come in competition with a number of fertilizer concerns that are located in North Carolina; with one exception, I don't know that any of the North Carolina fertilizer companies run or have traveling salesmen on the

road, but they do manufacture fertilizer in the state and sell it by some means or other.

Q. Right there, let me ask you whether or not it is conceivable in transacting business over a period of time that you wouldn't have to make some trip some time—can you conceive of business of any magnitude that wouldn't entail some traveling?

A. I can't, no, sir.

Q. All right, go ahead.

A. I also find hardware companies located where they have to use interstate transportation and traveling men into North Carolina who come into competition with a number of outstanding hardware concerns in the State of North Carolina, some of which have traveling salesmen on the road.

I also find scrap dealers in the states that use interstate transportation which come into North Carolina and buy in competition with scrap dealers in North Carolina.

I found glass and paint dealers located so that they must use interstate transportation to come into North Carolina and who sell in competition with similar concerns in North Carolina.

[fol. 270] I also found one creosoting plant which is the only one I have been able to contact located at Spartanburg, South Carolina, which travels men into North Carolina to buy timber for creosoting in competition with at least two creosoting plants in North Carolina.

I also find flour and feed mills and wholesale grocers located in all the states around North Carolina who travel into the state to sell their goods in competition with a number of mills and wholesale grocers in the State of North Carolina.

I also find tobacco buyers, which is the largest class of traveling men, although seasonal, that travel from locations principally in Virginia into North Carolina to buy leaf tobacco in competition with a dozen or more concerns in North Carolina who buy leaf tobacco.

Q. Right there, let me stop you for a minute. I will ask you whether or not tobacco raising and manufacturing is one of the most important industries in the State of North Carolina?

A. There is a large area of North Carolina devoted to raising tobacco. Just how important it would rank with other crops, I am not able to say.

Q. Isn't it also a large manufacturer of tobacco products?

A. I have seen the statement in the press that the revenue derived from manufacturing tobacco in the State of North Carolina was greater than any state in the Union.

[fol. 271] Q. Is Virginia also an important tobacco raising and manufacturing state?

A. It is an important raising state. It has lots of leaf tobacco dealers, and I doubt if it ranks—in fact, I know it doesn't rank with North Carolina as a manufacturing state.

I also find a number of pulpwood concerns or paper mills having their place of business in the states around North Carolina who travel into North Carolina and buy Pulpwood in competition certainly with the Champion Fibre Company at Canton, which is the only paper mill that I have run into in North Carolina.

I also find competition in buying of cedar logs between Lane Cedar Chest Company at Altavista, Virginia, and buyers for Greensboro and High Point.

I find a number of paper and container companies; that is manufacturers who travel interstate and sell in competition with similar concerns in the State of North Carolina.

I find also one shoe manufacturing concern which has salesmen traveling from Virginia into North Carolina, selling in competition with jobbers in the State of North Carolina.

The ordinary lumber and log buyers located at points outside of the state come into North Carolina and buy in competition with the veneer and furniture companies located in the State of North Carolina.

The furniture manufacturers all over the United States [fol. 272] travel to High Point once or twice a year to a furniture exposition where furniture is sold and bought in competition with North Carolina manufacturers of probably a dozen different places that travel intrastate to High Point.

I found foundry and machine companies located in adjoining states that travel into North Carolina and sell in competition with similar concerns in North Carolina.

I also find cotton mill supply companies that travel from South Carolina into North Carolina and sell textile mill

supplies in competition with similar concerns in the State of North Carolina.

I also find electric manufacturing and supply companies that travel interstate into North Carolina to sell their goods and supervise their agencies in competition with similar concerns in North Carolina who travel interstate.

I find one fire extinguisher company who travels from the State of Virginia and sells their ware in competition with similar concerns located in North Carolina.

I also find plumbing fixture companies located in adjoining states which travel into North Carolina and sell in competition with North Carolina concerns.

Exam. McGrath: Did you make any investigation to determine whether there are similar intrastate travel with those interstate concerns?

[fol. 273] The Witness: I have some of practically every one of those classifications that I know they do. I have not been able and haven't had time to cover the field to see just how many of them have men traveling by train. Of course, they must all travel in some way to carry on their business, but I have not been able to complete the picture for the intrastate as well as I have in interstate, and that is by no means complete.

By Mr. Clark:

Q. In most of these industrial classifications, you have given reference to the fact that there are such concerns within the state; that is to say, in existence?

A. There are such concerns in the State of North Carolina.

Q. Let me ask you if this competitive opportunity which you have shown doesn't exist two ways, it is the man in the adjoining state like Danville, Lynchburg, Richmond, for example, selling into Greensboro in competition with a man, say, located in Charlotte, selling to Greensboro—I use that to illustrate—that is one method of competitive opportunity that exists. Let me say also doesn't it exist in the reverse direction, a man at Greensboro desires to purchase, and he will purchase at Charlotte or he will purchase at Danville as the case may be?

A. That is true.

Q. So in other words, you are buying in and buying out—it is a double opportunity for the competitive situations that you have developed?

[fol. 274] A. Yes.

Exam. McGrath: To what extent is passenger travel on trains done by those respective competitors?

The Witness: The interstate points, a great deal of it—in fact, practically everyone of the houses I have interviewed, have men traveling into North Carolina to sell goods in North Carolina, but as I say, I have not had the time to develop travel within the State of North Carolina to see what the intrastate picture is like. I have some exceptions to that. I have some people that I know do travel within the State of North Carolina and travel by train. These people traveling from these interstate points are by train. I paid no attention to bus travel or people who travel by their own automobiles.

I also found two belting companies located in South Carolina, and which sell their product in competition with the belting company located at Charlotte, North Carolina.

I find brick and tile company located in Tennessee and one located in South Carolina, which sell in competition with manufacturers and sellers of brick and tile located in the State of North Carolina.

That is all of the classifications that I have been able to seggregate and find companies who are moving interstate.

By Mr. Clark:

Q. Mr. Hanes, as I understand, that is based on your having been born and raised in the state, based on your years [fol. 275] of travel in and about the state in connection with duties on the railroads and based on special and particular investigation which I requested you to make for the purpose of gathering as much data as you could to bring here today.

A. It is based almost solely on the work that I have done since you made the request. Of course, some of these people I knew before. It is a line I have never given much thought to. I worked Richmond, Virginia, personally; I worked Norfolk, and I worked Salisbury, and over the telephone, and I picked up what information I could in the time I had to pick it up in.

Mr. Clark: I should say I put this testimony in, Mr. Examiner, because we had a report from Examiner Stiles in the Alabama case and in the Kentucky case, in which certain comments were made to prompt me to think the Com-

mission would perhaps want this information, and we have endeavored in the time allotted to us to develop it along the the same lines.

My statement goes to the request I made to Mr. Buechler. I would have made that request of him sooner, and I say this in my place as a member of the bar practicing before the Commission, I did not know that records were available until about 12 o'clock on Friday, from which this data could be developed. I had previously sometime ago requested it, and through the source I handled it, had been told they did not have the data. I found that at quarter of twelve before Christmas that they did have the data from which we could [fol. 276] get it, and we did the best we could in the short time.

By Mr. Clark:

Q. Does that complete your statement?
A. Yes, sir.

Mr. Clark: That is all.

Cross-examination.

By Mr. Hillyer:

Q. Mr. Hanes, I would like to take up fertilizer first on your list. Did the statements of fact which you have presented here represent oral statements to you by other employees of the Southern Railway Company?

A. In some instances. In most instances it was written. A good deal of it was gathered over the phone,

Q. That is from other employees of the Southern Railway.

A. Yes, sir.

Mr. Hillyer: I move to strike any and all testimony of this witness which purports to come from other employees of the Southern Railway who are not here for cross-examination and witnesses who are available to the respondent railroads and not to us. This testimony is admittedly hearsay.

Mr. Miller: I join in the objection, Mr. Examiner.

Mr. Clark: Mr. Examiner, under the Commission's application of the hearsay rule, we have a more liberal practice than obtains in the courts, of which I am sure they are familiar.

Exam. McGrath: Have you undertaken to show the connection between Mr. Hanes' position and the others who [fol. 277] supplied the information?

Mr. Clark: Yes, sir. I said they were all members of the Southern Railway law department, claim agents who belong to the law department or department for which Mr. Hanes worked for many years.

Exam. McGrath: Do they customarily make periodic reports to you in these matters?

Mr. Clark: No, sir.

Exam. McGrath: It seems to the Examiner the objections are well taken.

Mr. Clark: We are quite accustomed to have witnesses appear before the Commission and testify on matters developed on their investigation, and you can't bring every man you interviewed to court, particularly in these times. It is utterly impossible to do it.

Exam. McGrath: The testimony will be received subject to the objection.

By Mr. Hillyer:

Q. As I understand, you covered part of the territory yourself?

A. I did.

Q. Will you give me one of those commodities as to which you yourself made an investigation?

A. All of the fertilizer companies that sell interstate, that travel interstate to sell in North Carolina or to supervise their selling agencies.

[fol. 278] Q. At what points did you make your investigation?

A. Richmond and Norfolk.

Q. At any other?

A. That is all.

Q. What was the nature of your investigation?

A. Principally I called the fertilizer companies' managers or some person in the offices of these companies and asked them whether or not they had men traveling into North Carolina, and whether they traveled by train. If they said they traveled by train, I used them. If they said they traveled by cars, I did not.

Mr. Hillyer: I move to strike the testimony of the witness with respect to any industries which he said that he

investigated at Richmond and Norfolk. As I understand, those are the only places; Is that right?

The Witness: Those are the only two places I investigated personally.

Mr. Hillyer: I move to strike the testimony as hearsay. We don't know who the persons were. They are not parties to this proceeding, and we have no opportunity for cross-examination.

Mr. Miller: I join in the motion.

Exam. McGrath: The testimony is received subject to the motion.

Mr. Gwathmey: I might say that during the hearings in [fol. 279] the class rates investigation now pending, I very vigorously objected on the ground of hearsay to testimony which had been obtained by a professor of the University of Florida, who had visited around the state and inquired from various manufacturers about their business, and not only I but various others objected on the grounds of hearsay, and the presiding chairman, Mr. Atchison, received it, stating in his opinion it was clearly not hearsay. Mr. Hillyer recalls that.

Mr. Hillyer: Let me point out the distinction. That witness testified to the exact location of each plant as to which he testified. He testified he was showing and using the original record of the company, and he testified from his examination of original records. He didn't testify as to what somebody told him, but from his examination of original records. I submit that Commissioner Aitchison's ruling was entirely proper.

Exam. McGrath: Any further questions on cross-examination?

Mr. Hillyer: Yes, sir.

By Mr. Hillyer:

Q. Mr. Hanes, did you undertake to carry your investigation down through these organizations to the traveling men themselves?

A. I did not. It would take six months to do that.

Q. Have you any knowledge of your own in connection, or in the course of being connected with the law department— [fol. 280] you know fully what I mean—have you any knowledge of your own firsthand of any instance where a traveling salesman from another state came into North Caro-

lina by railroad who competed at a particular origin upon a particular commodity with a traveling salesman of a North Carolina manufacturer who traveled by coach from certain other points to their destination?

A. I know personally the buyer for the Lane Cedar Chest people. I see him on our trains frequently, coming down into the cedar producing area of North Carolina and South Carolina to buy cedar logs. I don't go with him to buy the logs. I do know he comes into the state for that purpose—at least, he says that is his purpose. I know the traveling representative of three concerns in Knoxville, Tennessee, that work into the western end of North Carolina in competition with salesmen for wholesale concerns in Asheville. I don't go with them to Asheville. I don't see them sell the canned goods or flour or whatever it is. I know they make the trips and make them on the train.

Q. Do you know definitely of your own knowledge whether they use automobiles and busses, private automobiles?

A. I just told you I see them going on the train, but I gave no consideration to anybody that traveled by bus or automobile.

Q. Have you made any investigation to determine whether [fol. 281] any salesmen coming interstate into North Carolina use pullman, bus, or pullman seats or parlor cars?

A. I know that some of the traveling salesmen—I say I know this, I know their firms told me this, some of the salesmen moving from Richmond into North Carolina use sleeping cars; others do not.

Exam. McGrath: What do the others use?

The Witness: They use coaches; they travel by train.

By Mr. Hillyer:

Q. Do you know whether or not any of them travel by bus?

A. I know that the ones that I have considered do not. I know I investigated in the city of Richmond about thirty-five concerns. I would say that practically one-half of them gave me the information that they use busses and automobiles. I gave those no consideration whatever. I dropped them and took the concerns who travel, so they told me, by train.

Q. You spoke of the furniture market at High Point, North Carolina. You know as a native here that there are numerous manufacturers of furniture at High Point?

A. There is, and all over North Carolina, from Waynesville to Greensboro, at least.

Q. I am speaking of the manufacturers at High Point?

A. Yes, sir. I was speaking of the furniture exposition at High Point where they all gather from all over the United States.

[fol. 282] Q. Now, the manufacturers located at High Point don't have to travel by train at all to get to that exposition at all?

A. No. There is one of them that is in fifty yards of the Exposition Building.

Mr. Hillyer: That is all.

Exam. McGrath: Any further questions?

Mr. Miller: Yes.

By Mr. Miller:

Q. In making this investigation, y u say that you determined whether these persons had, whether these companies had salesmen traveling to and from points in North Carolina, and you determined whether or not these salesmen traveled by rail. Was that the full extent of your investigation?

A. It was, except in some instances. He would tell me he has three men in North Carolina, one traveled east, one center and one the western part of the state.

Q. Did he tell you how the men might be distributed?

A. Yes, sir.

Mr. Miller: That is all.

Exam. McGrath: Any further questions on cross-examination?

Mr. Hillyer: No.

Exam. McGrath: Any questions on redirect?

Mr. Clark: No.

Exam. McGrath: You are excused.

(Witness excused.)

[fol. 283] J. S. Tassin was sworn and testified as follows:

Direct examination.

By Mr. Clark:

Q. Will you state your name and residence?

A. J. S. Tassin, Richmond, Virginia.

Q. Your connection with the Southern Railway Lines?

A. General statistician with the Southern Railway System Lines.

Q. How long have you been general statistician?

A. Since 1932.

Q. How long have you been in the accounting department of the Southern Railway System Lines?

A. August 3, 1903.

Q. Have you had occasion to prepare four exhibits to be used in this hearing?

A. Yes, sir.

Q. I am going to hand you an exhibit of thirty-two pages, which we will mark No. 9.

(Respondent's Exhibit 9, witness Tassin, marked for identification.)

Q. Now, this exhibit has just been distributed and is headed, "Passenger Fares and Charges for Intrastate Traffic Between Points in North Carolina, Statistical Findings and Data in Support Thereof.". I will ask you whether or not this exhibit was prepared at my request to show the revenue effect on statement 1.

[fol. 284] A. Yes.

Mr. Clark: Your Honor will notice the pages are numbered up at the top, No. 1. Turn over to the next page, and you will see No. 2. The witness as he proceeds to this exhibit will refer to those numbers. The numbers in the center are the statement numbers, and the number over to the right is the page number.

Exam. McGrath: Is that going to be true through your succeeding exhibits?

The Witness: Yes.

By Mr. Clark:

Q. Take Statemen- numbered 1 and tell us the high light or what you have to say about that.

A. With the exception of two companies who furnished the information for nine months only, the column to the right of the statement shows a cumulative loss for the ten months ended September 30, 1943, amounting to $465,578.

The column immediately to the left of that shows on the closest twelve months' basis an average annual loss of $566,823; whereas, the column to the left of that, or the first column on the page figures a twelve months period, ending February 28, 1943, with a loss of $432,150—the object of the comparison being to show an increasing loss certainly through September, 1943.

Q. Now, these railroads from lines 7 to 20, are they the North Carolina lines?

[fol. 285] A. These roads are parties to the petition in this proceeding.

Q. All of these records, of course, were not kept by you. Did you get them from the accounting departments of the other roads?

A. Line No. 24 shows the source, audit departments of the several roads.

Q. All right. Go on to No. 2. On statement No. 2 you have shown, I notice the year's annual period from 1936 to 1942. Why did you show that?

A. 1936 was the first year in which the Interstate Commerce Commission carried the separation between freight and passenger services through to net railway operating income or deficit. That is why I started off with the year 1936. The source of these figures is shown on Line 21, annual reports to the Interstate Commerce Commission. 1936 was the first year in which that information was available from that source.

Q. The total under the year 1941 is $8,351,784. Is that the total for that year, and the previous years are shown on the same line 12?

A. That is right.

Q. You come out here with an average of $10,272,080. Tell us what that is an average of.

A. That is the average of the seven years, including 1942, which shows an income, whereas, all the previous [fol. 286] years showed a deficit.

Q. To understand it better, take the total under 1941, totals for each of the preceding years, would they add up to $98,604,552, that is down to the bottom of the page?

A. Yes, sir.

Q. That is the total deficit?

A. Yes.

Q. But $10,272,080 is the average annual deficit over the period, even allowing for the increase in 1942?

A. Yes, sir.

Q. If you take $98,604,552 cumulative deficit, subtract from that the single income of $26,699,988, and divide by seven, the total number of years involved, you arrive at that figure $10,272,080?

A. Yes.

Q. On line 23 you have the entry, "Years like 1942 required to wipe out", and then you have four. Does that mean it would take four years as good as 1942 to wipe out the cumulative deficit?

A. Yes. The object of that is not to make any claim for past deficits, but in view of the fact that in measuring fares and charges, we must, of necessity, work on period average and not on an individual year whether good or bad. Now, if you will take the ninety-eight million and odd dollars on line 23 and divide by $26,000,000 of 1942, [fol. 287] you will see that it is approximately four times as great. That means we would have to run through 1946 on as good a basis as we experienced in 1942 to wipe out this average deficit in the extreme right hand column.

Q. Mr. Tassin, taking the results of railroad operation as reflected in the statistics, is it better to take the statistical results over a series of years, or to take just the current year or one year? Which would be the more representative and best guide?

A. In making rates and fares, you have to work on what we call a normal level obtained by considering a number of years good and bad alike.

Mr. Clark: I believe that is enough for No. 2. We will now take up No. 3. The "I" shows income and all the rest are deficits. Is that clear?

The Witness: That is correct, and in the year 1942, there were two roads, the Clinchfield, line 7, and the Norfolk Southern, line 9, which showed deficits and not income.

By Mr. Clark:

Q. Statement No. 3, Mr. Tassin. I asked you about the use of a series of years. You have used that series of years method throughout your exhibits. Would that answer apply throughout the exhibit?

A. Yes, that is correct.

Q. Tell us about No. 3. Here is net railway operating income and the rate of return over a period. I think the [fol. 288] comparison here is the line 18 versus the line 32. Am I right about that?

A. Well, versus the lines 31 and 32. The purpose of this statement is to show that over an experience of twenty-two years, the class one carriers or class one railroads of the entire Southern Region, including those that serve the State of North Carolina, have not been experiencing any exaggerated returns on their capital investment or the cost of their properties for the average—take line 18—average of the years 1921 through 1930, the average rate of return was 4.2 per cent. That included, of course, the favorable years of 1925 and 1926, and in the most favorable year 1925, there was an earning of only 5.6 per cent. Now, when we go through the depression years, that 4.2 drops to 2.48. When we take the entire period up to the present, we get an average annual rate of return on line 32 of 3.23 per cent, certainly not an exaggerated return.

Q. Here is what you have done on line 18. You have taken the period 21 through 30, then come on down to line 31, and you take the average through 1942, from 1931 through 1942?

A. That is correct.

Q. Then you take the whole period 1921 through 1942 in the last line?

A. That is correct.

Q. The rate of return and net income are the figures of [fol. 289] principal interest there?

A. That is correct. These are Class 1 railroads of the Southern Region as a whole.

Q. All right. Now, take up statement No. 4.

A. Statement No. 4, for the same period, picks out the roads serving the State of North Carolina. It treats them, consolidates them, so to speak, as though they were a single road, on line 19, and shows an average annual return there of 3.41 per cent over the period involved.

Q. This is the same as the preceding statement No. 3 except you use the period 1921 to 1942, inclusive, only, and it is for the North Carolina lines as distinguished from the Southern Region?

A. Yes, sir, except you will observe on line 9 Atlantic & East Carolina, the note shows that that average is 1935 through 1942. I didn't have the full period there.

Q. Take up statement 5, where you have weighted in proportion to mileage, first, the total mileage and then the mileage of the several roads within North Carolina?

A. Yes, sir. Statement No. 4, as I have explained, is a cumulative comparison that gives no consideration to the proportionate service, let us say, into the State of North Carolina or the relative importance of the several roads other than as revealed by the amount of investment and amount of operating income. In order to get a comparison [fol. 290] with that showing, I have taken these same returns shown on statement 4 of the individual roads and first weighted them in proportion to the total mileage of the several roads, producing on line 18, a return on that weighted basis of 3.29 per cent. Then weighting those same returns in proportion to mileage in the State of North Carolina, the weighted return on that basis is 3.09 per cent.

Q. On statement No. 6 you do the same thing though weighting it on revenue need?

A. Yes.

Q. Point out line 19.

A. Perhaps I had better make clear just the distinction between Statement No. 5 and Statement No. 6.

Statement No. 5 shows a return less than five and three quarters per cent, indicating that there is revenue need, but does not show the extent of that need.

Statement No. 6 shows that in order to realize five and three quarters per cent on investment weighted on a total mileage basis, gross would have to be increased by twelve per cent. Weighted on state mileage basis, the gross would have to be increased by thirteen per cent.

Q. Is that sufficient on No. 6?

A. Yes, sir.

Q. Turn to No. 7, please, and hear we have got the elements of value of property used in the North Carolina lines. [fol. 291] I believe this exhibit demonstrates the reasonableness of the figures you have used in arriving at your

value of the railroads or investment in the railroads, I am not sure which the term is.

A. It is not value. It is investment as being under cost.

Q. I think this exhibit will bear a little explanation along that line.

A. The railroads generally measure their revenue need by using their investment in railway property used in transportation service as annually reported to the Interstate Commerce Commission in Schedule 211-N of the annual reports. To that figure, they add the amount of cash and materials and supplies at the end of each year.

Now, that investment, generally speaking, is less than the amount of cash that was required actually to produce the properties, the difference in cost being made up by earnings accrued back by the several railroads into their properties. In order to establish that as a fact, I have had reconrse to Exhibit A-11 introduced in Ex Parte No. 148, showing the usual comparisons from the standpoint of what is called original cost of reproduction new and less depreciation, land appraisals and working capital.

The column headed "Basis A" is what is called in Exhibit A-11, original cost to date. I have given it the caption of "Production Cost".

[fol. 292] Basis B is what is styled cost of reproduction new. I have given it the caption, "Reproduction Estimate."

Q. Those are taken from Exhibit A-11, and I will ask you whether A-11 was introduced in that proceeding by the Commission or some one else?

A. By instance of Commissioner Aitchison.

Q. By the Commission's own witness?

A. Yes, sir.

Q. You have compared there on line 20, $1,800,000,000 versus $1,700,000,000 to show conservativeness with which you think your figures are entitled to be considered?

A. Yes, sir. This figure which carries the reference mark on line 20 adds the reproduction estimate and the lands together which is the comparable figure with the figure reported by the railroads shown immediately underneath, showing that the basis used by the railroads is below the corresponding basis furnished in Exhibit A-11. As a matter of fact, the figure I have used would have to be increased by nine per cent to equal the corresponding figure used by the Interstate Commerce Commission. In connection with

my use of these figures from A-11, that does not mean that the railroads accept these estimates of the Bureau of Valuation.

Mr. Clark: I was going to say, if the Examiner, please, we don't espouse the correctness of the figure of Commission's Exhibit A-11. We use them to show conservativeness [fol. 293] of the figures we use here.

Q. Now, statement No. 8. I am going to ask you first what is operating ratio?

A. These are freight as compared with passenger operating ratios and are obtained by dividing freight and passenger revenues respectively into freight and passenger operating expenses respectively as determined under the rules of the Interstate Commerce Commission.

Q. You have taken again a series of years and the average, and if you will, please point out the high spot here.

A. Look at line No. 11, and run across there. In every instance until we reach the year 1942, it has cost more than a dollar to earn a dollar of passenger revenue. While in the year 1942, it cost less than a dollar, nevertheless for this group of roads serving North Carolina, the passenger operating ratio is higher than the freight, showing that the passenger is a burden on freight operations.

Q. One is 55 and the other is 63?

A. Yes, sir.

Q. These ratios are determined without regard to taxes or equipment rents or joint facility rates?

A. That is correct.

Q. Is that enough on No. 8?

A. Yes, sir.

Q. Now, No. 9—here again you have ratios, and you have [fol. 294] used a little different ratio, you call it outgo ratio here. Does that correspond to the ratio figured to the level of net railway operating income?

A. At the point where net railway operating income or deficit are determined. These ratios give consideration to taxes and equipment rents and joint facility rents.

Q. You have described how you get your freight and passenger ratio, your operating ratio, you said net railway operating income is a figure arrived at after giving consideration to taxes and equipment rents and joint facility rents?

A. Yes.

Q. Here are some ratios based on that status of figuration. Tell us how you got these ratios?

A. These ratios are obtained by adding to expenses, the net amount of equipment, joint facility rents, and taxes, and then dividing by revenues, the figure of net operating income is obtained by subtracting the one figure from the other.

Q. It is really two figures that you have to add in, the equipment rents, joint facility rents, and taxes to expenses as it were?

A. Yes.

Q. You get a bigger figure then to divide by your revenue?

A. Correct.

Q. And what is left of your revenue after you do that constitutes net railway operating income?

[fol. 295] A. Yes, sir.

Q. This statement is subject to the same explanation and understanding as the previous one?

A. That is correct, and it shows in every instance an outgo of more than a dollar—that is every instance except 1942—an outgo of more than a dollar to earn a dollar of passenger revenue.

Q. The average is 75 versus 116?

A. Yes, sir.

Q. Turn to No. 10, please. Here you have got revenue per car mile for all passenger carrying car miles; is that right?

A. That is correct.

Q. This is familiarly what we call rear-end cars?

A. Rear end of the passenger train.

Q. Give us the high spot on that.

A. Look at line No. 17, and 1936 through 1940 a representative earning per passenger carrying car is around, I should say, 16 cents a mile. In 1941 it jumps up to in round figures 22 cents, and in 1942, 40 cents a mile. The average for the seven years' period is 21.53 cents a mile.

Q. You have identically the same kind of computation on statement 11 to cover the front end cars; that is baggage, mail, and so forth?

A. Yes. The purpose of the comparison is to show that the failure of passenger cars is attributable to passenger [fol. 296] carrying cars rather than front end cars. The front end cars represent less investment and cost less to

clean and supply, and yet they produce a higher revenue per mile.

Q. The rear end cars are transporting the passengers?

A. That is correct.

Q. And these front end cars are the express and mail?

A. Mail, milk.

Q. No. 12, Mr. Tassin, please. Here we have got revenue per passenger mile, and this, as I understand it, is the coaches?

A. That is correct.

Q. It doesn't include sleepers?

A. No, sir.

Q. This is gotten up on the same general plan as those immediately preceding statements?

A. Yes, sir, except I couldn't get any figure prior to 1937 here.

Q. That was as far as the records were available?

A. Yes; as far as the separation of this coach traffic was reported to the Interstate Commerce Commission as shown on line 18.

Q. To make No. 12 perfectly clear, these several roads, lines 5 to 10, is this statement based on their operation as a whole or their operation within the State of North Carolina?

A. Their operation as a whole.

Q. This shows that with a basic fare of 1.65 in recent [fol. 297] years that by reason of the round-trip reduction and other reductions, the average earning per passenger per mile has been lower than 1.65.

Q. The average is 1.499?

A. Yes, sir.

Q. No. 13, here we have the parlor and sleeping cars that were omitted from statement 12.

A. Yes.

Q. Is there any comment on that?

A. No, except that we wanted to give the whole picture, coaches as compared with the parlor and sleeping cars, which earn more per mile. They have a higher rate and yet it is cut down by round-trips and other reductions in rates.

Q. Now, statement 14 is a similar computation for the same roads, gotten up in the same way, but here we have coach miles as I understand it?

A. Yes, sir.

Q. Earnings per coach per mile in cents?

A. Yes.

Q. And it is gotten up the same way, so it should be readily understood?

A. Yes, sir.

Q. Again this is on the railroads as a whole and not confined to North Carolina?

A. Railroads as a whole, but railroads that serve North [fol. 298] Carolina.

Q. For instance, the Southern Railway which serves North Carolina but it is the Southern Railway proposition?

A. Yes, sir.

Q. In these computations in which you have referred to Southern Railway, you have used the Southern Company, not the system?

A. Southern Railway, because other system lines do not enter into North Carolina.

Q. No. 15 now.

A. May I point out at this time that a lower intrastate fare cuts down these earnings. That is one of the purposes of these comparisons.

Q. Per coach mile?

A. Per coach mile.

Q. Let's have No. 15. Here you have got parlor and sleeping cars per car mile; is that right?

A. Yes, sir, companion statement.

Q. Does that need any comment?

A. It does not.

Q. On No. 16, we get to tax accruals?

A. Yes, sir.

Q. This is from Interstate Commerce Commission account, and you have shown a series of years.

A. Yes, sir.

Q. I want to ask you to point out the high spot there. I [fol. 299] think I see it, but you had better mention it.

A. Of course, the high spot is that the tax burden in 1942 was over six times what it was in 1936.

Q. It was $20,760,388 as compared with $126,068,803?

A. Yes, sir.

Q. Any further comment on that?

A. This is the tax burden as a whole, not separated between passenger and freight.

Q. The next statement No. 17 is where you break it down as tax accruals for passenger operations?

A. That is true.

Q. Here you used only the North Carolina lines?

A. That is correct.

Q. Here we notice the comparison, using 1936 and 1942, for 1936 it is 100, and in 1942 it jumped up to 446.

A. That is correct, and comparing this with the preceding statement, it shows that freight is bearing more than the passenger of the tax burden.

Q. In other words, in 1942, the total was 607, and when you cut it down to passenger, it gets to be 446?

A. Yes.

Q. No. 18—now again you have the North Carolina lines, and here is a question of compensation based on the hourly rate?

A. That is correct.

Q. Tell us the high spot here.

[fol. 300] A. Well, using 1936 as the basis of comparison, in 1942 the average hourly rate of compensation was 37 per cent higher than it was in 1936, and this will be raised by any retroactive wage adjustment. It throws any such adjustment on the year 1942.

Q. This statement No. 18 does not reflect any increase in wages incident to employing more men or more women, but in the hourly rate paid to the number of men, whether it is large or small?

A. That is correct.

Q. No. 19 is the unit prices of material, supplies, including fuel. Tell us about that, please.

A. Using October 1, 1936, as the basis of comparison and looking at June, 1943, the last column to the right, forest products have increased, and this is the increase in price. Forest products have increased in price 93 per cent; iron and steel, 21 per cent; miscellaneous products, 18 per cent; the total, excluding fuel, 36 per cent; fuel, including both coal and oil, 47 per cent, and a total, including fuel of 40 per cent.

Q. Do you have any further comment on that?

A. No.

Q. No. 20, we get here to revenue passenger miles per train mile. Is this the total number of passengers hauled per train mile?

[fol. 301] A. That is correct. It is supposed to represent the average number of passengers for a given distance handled by train.

Q. Here you have got an average on Line 16 of 65.58. Tell us what that means in simple language.

A. That means the average number of passengers on a train for the average distance over those five years was roughly 60 cents.

Q. Statement No. 21 is the same kind of statement, only going from the years 1921 to 1930; is that correct?

A. Yes, sir, and shows the average number of passenger-was 48.

Q. In the year 1930 it dropped to 31.04?

A. In the year 1931 through 1942, the average was 37.9.

Q. Which is shown on Statement No. 22?

A. Statement No. 22, line 17.

Q. On Statement No. 23, at the top, we have here revenue passenger miles per train mile for the North Carolina lines. This is a little different kind of statement. Tell us what this line 16 means. Take that exhibit that I have told you is a little bit different and refer each time to the top number so these gentlemen can know what page you are talking about.

A. We had commented through 1930, and now we are on statement No. 22, which is page 25, and the average number of passengers per train is in round figures 38, appearing on line 17.

[fol. 302] Q. Wait a minute—that is not the average number of passengers per train.

A. Average number of passengers per train, revenue passengers per train mile for the period 1931 through 1940.

On Statement No. 23, we show where a jump in the year 1941 to 75 passengers per train; in 1942, to 146 passengers per train, and for the first seven months of 1943, a jump to 211 passengers per train.

Q. Now, let's take statement No. 24.

A. That is revenue passenger miles per train-mile. It is the accepted measure of average number of people on the train for a representative distance. It is revenue passenger miles divided by passenger train miles.

Exam. McGrath: Would that give you the number of passengers per car?

The Witness: That is how it is popularly referred to.

Exam. McGrath: Per train mile?

The Witness: Yes.

Exam. McGrath: Not per car?

The Witness: No; it is per train. Statement No. 24 gives you the comparison per car mile. You have got the number of passengers in a car. Now, statement No. 24 gives the comparison for the first five year period, showing that in the prior war, World War No. 1, the peak of car congestion, if you want to call it that, was in 1918, and then it began to [fol. 303] taper off. The peak was in 1918.

When we take statement No. 25 and cover the postwar period through 1930 and prior to the depression, you will notice the falling off in car occupancy there. If you will look at line 16, you will see the number of people in a car was on a decline even in such a good year as 1926, when we averaged eleven persons per car; that is passenger carrying car.

Statement No. 26 carries that comparison from 1931 through 1940, the lowest being 1932 when there was six passengers per car, and 1940 being the highest, when there were eleven passengers per car—the average for the period being nine passengers per car.

Statement No. 27 shows the result of the present war, fourteen passengers per car in 1941; twenty-three in 1942, and thirty-one for the first seven months of 1943.

Exam. McGrath: That includes all classes of equipment, does it, coaches as well as pullmans?

The Witness: Yes, all classes of passenger carrying equipment.

By Mr. Clark:

Q. On 28 here, you have got passenger miles per coach mile?

A. Yes. This is in a coach and doesn't include pullman or parlor cars, and the figures are only available from 1937 as [fol. 304] has been explained.

Q. This is passenger miles per coach mile?

A. Yes, but passenger miles are made by people.

Q. That is one people for each of these; is that right?

A. Yes, one person. In other words, in 1937, you had on an average of fifteen persons per car and in 1942, it had jumped to thirty-four.

Q. That is strictly coaches?

A. Yes, and in the first seven months of 1943, they jumped to forty-five.

Q. Statement 29 is the same thing for parlor cars?

A. That is correct, and that is the last statement in the exhibit.

Exam. McGrath: We will take a brief recess.

(A short recess was taken.)

Exam. McGrath: The hearing will be resumed.

By Mr. Clark:

Q. Mr. Tassin, I notice on your Exhibit 9 on several of the statements, say for example, statement No. 7, you show several roads for which the data is lacking. May I turn you to statement No. 5 and call your attention to the fact that A & R has forty-five miles within the state; the A & E C, 97; the Danville & Western, 9; the L & N has only 13; Winston-Salem Southbound, only 98. Those are relatively short lines within the state?

A. Yes. You will find statistics for the L & N through all [fol. 305] the exhibits, because it is Class 1 road. The others are relatively unimportant roads, second class roads, and information was not available, and even if it had been available would not have materially affected the result.

Q. There may be some class three roads in them too?

A. Yes.

Q. They are certainly not class 1?

A. No.

Q. Let's take up your next exhibit which will be No. 10.

(Respondent's Exhibit No. 10, witness Tassin, marked for identification.)

Q. This exhibit is three pages; is that right?

A. That is correct.

Q. I have distributed it now, and there are only two pages that you can make much comment on. Look at page 2.

A. Yes, sir.

Q. Did you at my request prepare this to show what the situation would be in all four of these states, Alabama, Kentucky, Tennessee, and North Carolina, if the 1.65 rate is continued? Is that the purpose of this?

A. Yes. It puts them all on equal comparison basis by stating them all on twelve months basis, beginning December 1, 1942, and ending November 30, 1943, estimating for those months that were missing.

Mr. Miller: Mr. Examiner, I wonder what relevancy [fol. 306] Alabama, Kentucky, and Tennessee figures have in this proceeding.

Mr. Clark: They are important, Mr. Examiner, because if one of these states continue 1.65, it is going to be right hard to keep his next door neighbor at 2.2. We shall have to show the result, and it has been recognized in one of the Commission's decisions.

Mr. Miller: I object to the exhibit on the ground it is broadening these issues beyond the scope of this proceeding.

Exam. McGrath: It is, of course, understood the only issues in this proceeding are with respect to fares in North Carolina.

Mr. Clark: That is true, but the status of these railroads is a bit broader than the State of North Carolina.

Exam. McGrath: The exhibit will be received subject to the objection.

By Mr. Clark:

Q. The total figure for the four states is $2,420,035?

A. Yes, sir.

Q. My attention has been called and it has been asked that you tell why you started here with December 1, 1942, to get your year?

A. Because the railroads asked all the states effective December 1, 1942, to make the intrastate rate the same as the interstate. That was the date.

[fol. 307] Mr. Clark: Mr. Gwathmey calls my attention to the fact that you have confused the filing of tariffs with the filing of petitions; December 1st would be the effective date of the tariffs.

The Witness: Yes.

By Mr. Clark:

Q. Not the filing of the petition date?

A. No. That was two months earlier, I understand.

Mr. Gwathmey: You recall in certain states, Mr. Tassin, it was not necessary to petition the State Commission for

authority to make the increase. In those states, the tariffs were filed to become effective December 1, 1942, but you also recall, I take it, in other states, including North Carolina, I believe, petitions were filed asking authority to make the increase effective immediately.

The Witness: That is correct.

Mr. Gwathmey: You have used that date as the starting point?

The Witness: I used that date as the best approximate date from which to measure the effect.

By Mr. Clark:

Q. Turn over to Page 3, which gives the situation with respect to the Southern Railway in the several states into which it operates and also the system lines.

A. Southern Railway System lines touch every state, and in the whole——

Mr. Hillyer (interposing): I object on the ground there [fol. 308] is no proposal in this proceeding to reduce the intrastate fares in the states mentioned.

Exam. McGrath: What is the relevancy of this information?

Mr. Clark: It is very essential to know. In the decision in Docket No. 16321, State Corporation Commission of Virginia versus A & R Railway, 161 ICC at 282, decided February, 1932, the point was made by the Commission, and I read:

> "Reductions in intrastate rates in other southern states, several of which could justly claim a basis as favorable, as North Carolina could not fail to undo in a large measure what was accomplished in Southern Class Rates Investigation."

There the Commission recognizes the action of one state commission on the others, and it is appropriate for us to show in this record what the situation is with respect to these other states where proceedings are pending. If it spreads—if we are knocked off here, and it spreads there and spreads there, this is the result.

Exam. McGrath: That is the purpose of showing that?

The Witness: Yes, sir.

Exam. McGrath: It will be received for that purpose.

Mr. Gwathmey: May I ask whether the OPA joins in the objection just made by Mr. Hillyer?

Mr. Miller: Yes, I will join in it.

[fol. 309] Mr. Gwathmey: I will ask whether Mr. Hillyer and counsel for the OPA are now prepared to admit that the interstate fares are reasonable.

Mr. Miller: No, sir.

Mr. Hillyer: That is not in issue here, and it has been so stated.

Exam. McGrath: Any further questions on this exhibit?

Mr. Clark: Mr. Hillyer has injected a statement there which I think can be discussed on brief.

By Mr. Clark:

Q. Tell us how you tied this to the Southern Railway System Lines?

A. Well, of course, we keep the intrastate passenger revenues by states as is shown on lines 6 to 18, inclusive, line 19 representing the total for the system, and then down at the bottom in the four states in which we have made studies of the losses, I have determined the ratio of those four states to be 25 per cent of the total and applied that 25 per cent to the system figures to show what the effect would be on the Southern Railway if the whole south went 1.65.

Q. The bottom part of the exhibit shows how you got 25 per cent?

A. It shows how I got 25 per cent.

Q. Does that finish that?

A. Yes.

Q. The next exhibit will be No. 11.

[fol. 310] (Respondent's Exhibit No. 11, witness Tassin, marked for identification.)

By Mr. Clark:

Q. This exhibit seems to be nineteen pages; is that correct?

A. Nineteen statements and nineteen pages.

Q. You go ahead and tell us about this one.

A. The statement No. 6, half of that statement to the left is a comparison of freight revenue, accounts 101 and 121, for the month of December, 1942, as compared with December, 1941, and January through October, 1943, as

compared with the same months in 1942, the column headed "Rate of Increase or Decrease" being the percentage increase or decrease of the current period over the prior period, month by month. For example, the peak month there is the month of December, 1942, as compared with 1941, where freight revenues increased 91 per cent. From that point on, they tamper down. You will observe line 13, the month of May where there is a jump from 42 to 36. Now, it was May 15th when the ten per cent increase on freight was——

Q. (Interposing) Not ten per cent.

A. The increases on freight were discontinued. That shows the effect of that on freight revenues until we come to the month of October, where October, 1942, was actually slightly less than October, 1941.

The three columns to the right shows a similar information with respect to passenger revenues, accounts 102 and [fol. 311] 122. Again notice the enormous increase of December, 1942, over December, 1941, and tapering decreases from that point on.

The lower half of the exhibit takes the month of December of each of the periods current as compared with prior and uses that as Index No. 100 and shows the increase of the succeeding months over the month of December, and here again you take 1943 under freight as compared with 1942, and you note that same tapering down in the percentage of increase. There is an increase, but it is going down. We do the same with respect to passenger. Now, the purpose of this double comparison is to show that as far as statistics are concerned past experience can be relied on, and we have passed the peak in this emergency. The peak was certainly in the first half, if not the first quarter, of 1943, and we can expect a leveling off and lowering from now on.

There are sixteen class 1 railroads that serve the four states which I have had occasion to study, and I have used these four states, because I believe that the railroads that serve them are fairly representative of the situation in the South as a whole.

If you will, turn now to Page 2, statement No. 2. I have shown the peak month for each one of these roads. Now, just glancing down that column, you will observe that nine of those sixteen roads reached the peak percentage of increase in the month of February and that is the——

[fol. 312] Mr. Hillyer (interposing): Are these figures percentages?

The Witness: Yes; current over prior period.

Mr. Miller: Excuse me, may I ask a question for clarification. Those months are the months during which there was the greatest acceleration of increase of revenues; is that correct?

The Witness: No. The greatest percentage of increase over the corresponding month of the prior period, the same month in the prior period, January, 1943, as compared with January, 1942, and in the case of nine of these roads, as I have said, the month of February, 1943, over the month of February, 1942, showed the highest percentage of increase than was shown by any other month, the object being to show that the peak of this thing was, I believe, in the first quarter of 1943.

Mr. Miller: There still might have been an increase in dollar revenues in succeeding months?

The Witness: There was some increase. I am trying to place the center of gravity of this thing.

By Mr. Clark:

Q. Come back here to Statement 2. You have two columns, one headed "Before" and one "After."

A. Yes.

Q. And the last one there, the sixteen roads, you have two under before and eight after. What is the two and eight. Mr. Hillyer wants to know.

[fol. 313] A. You have got—there are eleven months in all involved. If one month is the peak month, then there were ten months remaining and before, there were two months before the peak month, and necessarily the peak month was the third, and that left eight months of lower increase than the peak month. You see it is two months before you reached the peak and eight months after the peak had passed.

Mr. Hillyer: Those are months instead of percentages?

The Witness: Those are not percentages.

Exam. McGrath: Get it straight on the record. What do you mean by that, number of months? Those figures represent number of months?

The Witness: Yes, sir.

By Mr. Clark:

Q. It is this, you have a period here from December, 1942, to October, 1945?

A. Yes, sir.

Q. Versus a similar period in the following year?

A. In the prior year.

Q. It is two similar periods of months compared with each other?

A. Yes, sir.

Q. For instance, take A B & C, you have got—the first thing you show there is three, and then March and then seven.

A. Yes.

Q. Three and seven are ten, and March would be eleven?

[fol. 314] A. Yes, sir.

Q. Just tell us what the three means. It certainly is not a percentage.

A. Look at the second line of the title, Mr. Clark.

Q. It isn't a percentage?

A. No, sir.

Q. I want to ask you whether your answer to Mr. Hillyer was understanding his question, because that is what you told him.

A. My understanding was that Mr. Hillyer was referring to statement No. 6.

Q. Go on and tell us what No. 3 is.

A. No. 3, as the second line of the title makes clear, is three months before the peak month and seven months after the peak month. In other words, I am showing that the peak month was back in the early part of the year, and you had more months before you—I mean you had more months after the peak than before it.

Q. What does March mean?

A. March was the peak month.

Q. Then on A B & C, it was what three months before, from January or was it December?

A. December, January, and February.

Q. That three then represents December?

A. December, January, and February.

[fol. 315] Q. In other words, March was the fourth month in the period, and it is the peak month, and there was still seven months more that were not peak months?

A. That were below the peak month, that came after the peak month.

Q. In other words, the column of months under the word "peak" are merely to designate its place in the period you are comparing?

A. That is correct.

Mr. Clark: Is that clear, Mr. Examiner?

Exam. McGrath: Yes.

The Witness: It is to show how early in the period the peak was.

Mr. Clark: Is that straight, Mr. Hillyer?

Mr. Hillyer: Yes, sir.

By Mr. Clark:

Q. Is there any other comment on this exhibit?

A. No. That is the basis of my statement that as far as I can determine statistically, we have passed the peak.

Q. We will now take up Exhibit No. 12, which we will distribute.

(Respondent's Exhibit 12, witness Tassin, marked for identification.)

By Mr. Clark:

Q. This is an exhibit of nineteen pages. Here you seem to have an exhibit gotten up substantially like the preceding [fol. 316] exhibit No. 11, but you have used total revenues and expenses. It seems to be a companion exhibit to No. 11; is that correct?

A. Yes, sir.

Q. Is there anything special to be pointed out here that you think will be helpful?

A. The only thing special to point out here is that in the data referring to expenses that any retroactive wage adjustments are going to increase the amount of expenses.

Q. Do you think there is anything special to add to this?

A. Nothing, to my mind; it is prepared the same way.

Q. Mr. Tassin, of course, you deal with things in the operation of this railroad as reflected in the statistics. Yours is a statistical approach. That has been your raising in connection with the railroad?

A. Yes, sir.

Q. And these exhibits are statistical reflections of the practical situation?

A. Of things past and to come.

Q. Based on that, tell us whether or not in your opinion the wholly intrastate traffic would support the railroad service that is being given to the State of North Carolina and its citizens.

A. The volume of intrastate revenue will not support railroad service.

Exam. McGrath: In North Carolina?

[fol. 317] The Witness: In any state.

Exam. McGrath: We are only interested here in North Carolina.

The Witness: In North Carolina.

By Mr. Clark:

Q. In interstate traffic your tonnage is greater and your revenues are greater than the intrastate?

A. The volume of interstate is greater than intrastate.

Q. Is there any tendency as statistics reflect to show that intrastate traffic gets the benefit of the greater volume of interstate traffic?

A. Obviously. So far as cost statistics are concerned, there is no distinction in service between interstate and intrastate, and intrastate gets the benefit of the greater volume of interstate in holding the cost down.

Q. You have heard the testimony, I take it, this morning of the operating and traffic witnesses that there is no distinction in these services whether interstate or intrastate?

A. That is true.

Q. I take it if they were traveling and using the same facilities, it would incur the same cost?

A. That is true.

Q. Normally under a system of that kind, volume reduces unit cost?

A. Yes, sir.

Q. To that extent you find intrastate passenger traffic is [fol. 318] getting the benefit of the greater volume of interstate?

A. It benefits to a much greater extent than the interstate from intrastate.

Q. I believe you said other railroads furnished you the data that you showed in your first Exhibit No. 9 the composite figure for the several railroads, which was that—statement No. 1 in Exhibit 9?

A. Statement No. 1 on page 4 of Exhibit 9, line 24 shows the source, audit department of the several roads.

Mr. Clark: I should say in that connection, Mr. Examiner, to avoid unnecessary cross-examination that Mr. Gwathmey has Mr. King from the Seaboard and Mr. Anderson from the Coast Line both here from the accounting departments of those roads, and they can be examined on the figures for those roads should it become necessary. I frankly admit Mr. Tassin himself could not answer perhaps some of the questions counsel might wish to ask.

By Mr. Clark:

Q. Did you prepare or have prepared under your direction, Exhibits Nos. 9 to 12, inclusive?

A. Yes, sir.

Q. Are they true and correct to the best of your knowledge and belief?

A. Yes, sir.

Mr. Clark: We offer Exhibits 9 through 12.

Mr. Miller: I would like to request that ruling be delayed [fol. 319] until after cross-examination.

Exam. McGrath: All right. Does that complete direct examination?

Mr. Clark: Yes.

Mr. Hillyer: Before the exhibits are offered, I want to say that there are a number of lines' statistics included in these exhibits which do not operate in North Carolina and the experience of those lines is not in issue in this proceeding. I am not asking that they be excluded from this well prepared exhibit, but I don't want the record to go without objection to the consideration of the revenues and expenses of those other lines.

Mr. Clark: We have shown and stated which roads were operating within the State of North Carolina and showed the length of their miles in each instance in the state, so it is clearly apparent.

Exam. McGrath: You may cross-examine the witness.

Cross-examination.

By Mr. Miller:

Q. I want to ask you some questions first about your Exhibit No. 9, Mr. Tassin. Turning to your statement 3 on

page 6, that column entitled, "Investment in Railway Property used in transportation service" used in that statement and also in the following statement, those figures are 211-N figures?

A. 211-N figures. You will note the reference, a small [fol. 320] "a," which shows that there is included in there the allowance for working capital, which, as I have explained, is the amount of cash for material and supplies on hand at the end of each of those years.

Q. Then they are 211-N plus cash and material and supplies?

A. That is correct.

Q. Does 211-N include only the property owned by the specific roads shown in statement 4, or does it include property which they lease but use?

A. It doesn't include all of the property owned. It includes only that much of the property owned that is used for transportation purposes plus the leased property that is otherwise operated.

Q. Which they use but do not own?

A. Which they use but do not own. It is the property that produced the net railway operating income.

Q. Is there any deduction of accrued depreciation represented in those figures?

A. No, sir.

Q. Are there any accruals for amortizations of defense projects?

A. No.

Q. Now, in statement 4, is that investment figure that you have given for each of those railroads the average figure for the years 1921 to 1942?

[fol. 321] A. Yes.

Q. It is not the figure for any particular year?

A. No.

Q. Is there any way in which from the annual reports of the carriers to the Commission that depreciation can be deducted from that investment figure?

A. To the extent that it is accrued.

Q. Do the carriers report the accrual on the property which they own or property which they use?

A. Both.

Q. Do the depreciation accruals include depreciation on property which they lease from other lines?

A. Equipment, yes.

Q. I am talking about the line.

A. The line itself?

Q. Yes.

A. Not unless they are required to do it. Some roads do; others don't.

Q. This net railway operating income on which you figure this rate of return in statement 4 is after deduction of Federal income tax, isn't it?

A. Yes.

Q. Statement 7, which is the statement regarding elements of value gives Basis A and Basis B as capital outlay bases. Are those figures opposite each line the so-called [fol. 322] original cost to the carrier of the property which it owns?

A. It is the Bureau of Valuation's estimate of that.

Q. Of the property which it owns or which it uses?

A. Which it uses. It includes owned and used, used not owned.

Q. But it is basically the same sort of figure as 211-N?

A. Yes.

Q. Were these figures used by the Interstate Commerce Commission as basis for any calculation of rate of return?

A. Not to my knowledge, they were not. They were put in the record.

Q. Turning to Statement 16 on page 19, regarding tax accruals, do you know which of those lines are paying excess profit taxes?

A. I know that Southern Railway is in 1942. I cannot answer for the other roads.

Q. Do you know what the rate of that excess profits tax is for the Southern Railway?

A. I do not, but it will have to be readjusted following any retroactive wage adjustment.

Q. Turn to statement 24 on page 27—rather I should say statements 24 to 29, inclusive.

A. Statements 24 to 29?

Q. Yes.

A. I will revise that, 24 to 27, inclusive. Was the computation made by including such cars as diners and ob- [fol. 323] servation cars and buffet cars, and such equipment?

A. Statements 24, 25, and 26?

Q. Yes.

A. Yes.

Q. Was it also based upon a computation which included empty cars which were deadheading?

A. Yes, it reflects that.

Q. One question to clarify Exhibit No. 11. In statement 2 you have for the A G & S, the peak passenger revenue month as March. Turning to statement No. 4, which is the same railroad, I notice that the month in which the largest passenger revenues were earned in dollars is the month of September. I ask this question, are not Exhibits Nos. 11 and 12 designed to show accesleration of revenues rather than increase of revenues.

A. They are designed to show the highest rate of increase in revenue the month of the current period as compared with the prior period.

Q. Do you understand what I mean by the word "acceleration"?

A. I understand, and that reflects seasonal variation, and for that reason, we are comparing the month of this year with the same month of last year to get away from any question of seasonal variation.

Mr. Miller: That is all the questions I have. I would like to register my objection now, if you don't mind, in the [fol. 324] light of the cross-examination, or shall I reserve it?

Exam. Miller: You can object.

Mr. Miller: I object to Exhibit No. 9, to the following statements, 3 and 4 on the ground that the rates of return are based upon an improperly high rate base which does not include accrued depreciation or accrued amortization of defense projects, and because the computation is made from net railway operating income after Federal taxes and excess profit taxes; and I object to statements 4, 5, and 6, on the ground that they show—I mean they do not show the present situation because of the averaging over the period 1921 to 1942, and I object to Exhibit No. 10, because it goes beyond the issues in this proceeding. I also object to Exhibits Nos. 11 and 12 for the same reason that I object to No. 10. In other words, for example, G M & O and other lines are not in the case at all.

Exam. McGrath: Your objection will appear of record. Most of them go to the weight of the evidence and not to the admissibility, and they were overruled.

Mr. Hillyer: I would like to join in the objection made by Mr. Miller.

Exam. McGrath: Same ruling.

Mr. Gwathmey: Mr. Miller asked Mr. Tassin a question about No. 16, statement No. 16, in Exhibit 9, to which Mr. Tassin replied he could answer for Southern Railway but [fol. 325] could not answer for other lines. I merely wish to state again that representatives of both Atlantic Coast Line and Seaboard Air Line are present in the room and will be prepared to answer those questions if Mr. Miller wishes to address his questions to them.

Mr. Miller: I would appreciate very much having an answer to that question.

Exam. McGrath: We will reach them in due order.

By Mr. Hillyer:

Q. Mr. Tassin, in your exhibits you have used the word "loss" in the headings. Do I understand correctly that you use that in the sense of the difference between the revenue which was derived under the existing rate and what would have been derived under proposed rate?

A. That is correct.

Q. In your Exhibit No. 9, page 5, statement 5, you show the Norfolk Southern Railway with 634 miles in the State of North Carolina. Do you know whether or not passenger service is operated over those 634 miles?

A. I do not. That figure was obtained as line 20 shows from the reports of the Commission.

Q. On that page, will you indicate, if you can, without stopping to look it up, which are class 2 roads and which are class 3?

A. I couldn't from memory say.

Q. In computing these figures, do I understand that you [fol. 326] have used some formula or method for separating the rate of return on carrier investment in North Carolina separate from the system as a whole?

A. These are all system figures except the Mileage. The North Carolina mileage, of course, is North Carolina mileage used as a weighting factor.

Q. What does return mean there in the next to the last column to the right under heading, "State of North Carolina"?

A. It is the system average annual rate of return but in getting a group average, the roads are rated in proportion to their North Carolina mileage service.

Q. In other words, the figures in the second column and the fifth column are approximately the same with one exception, line 18?

A. Line 18, naturally, for that is the total column. That is the weighted result.

Q. You don't mean then that you arrived at some method of separating the rate of return on North Carolina property?

A. Not separating but weighting in proportion to North Carolina mileage.

Q. On Exhibit 9, statement 7, why did you omit one of the primary factors of valuation; that is cost of reproduction due less depreciation?

A. Because I am offering a cost comparison, and on the ground that the railroads are showing their necessity in [fol. 327] the present emergency and cannot be considered as worth less than they cost.

Q. On Exhibit 9, statement 8, you have included in the ratios there the L & N. Isn't it a fact that only a negligible proportion of the L & N Line is within North Carolina?

A. A very small proportion, 13 miles as shown on statement No. 6.

Q. But on Statement No. 8, the L & N's rations are figured into your total on line 11?

A. Yes; the available roads are shown, but the exhibit permits relative weighting with respect to these ratios just the same as with respect to other factors.

Q. Well, the presence of the L & N in those figures serves to bring up the total of other Southern Railway figures; do they not?

A. Yes, and as I say, the exhibit permits the reweighting of those ratios in proportion to mileage if so desired. I illustrated the method but didn't go to the detail of doing it all the way through.

Q. On Exhibit 9, statement 12, in comparing the average revenue per passenger mile in coaches, do those figures include furlough fares?

A. What statement is that?

Q. Exhibit 9, statement 12.

A. Yes. That is one of the things that brings them [fol. 328] down, brings the average down.

Q. Does it include revenue derived from troop train movements?

A. Anything traveling in coaches at the coach fares is included in there.

Q. The answer is it would include the troop train movement revenue?

A. Not if it was the special rate applied on troop trains. It depends on the nature of the troop train movement.

Mr. Miller: If it is in coaches, it would be included?

The Witness: If it is in coaches, yes.

By Mr. Hillyer:

Q. On Exhibit 9, statement 16, total railway tax accrual, does your answer to Mr. Miller on his question of Federal taxes related also to this sheet? Does this include Federal income taxes?

A. Yes.

Q. And is the same true as to Statement No. 17?

A. Yes, sir.

Q. Statement No. 18, you show indices of hourly compensation. Did you use there the minimum base wage rate per hour, or did you use all wages and salaries paid?

A. All wages and salaries paid, hours into compensation.

Q. And all jobs, all classes?

A. All jobs, all classes.

Q. On Statement No. 19, you show index of average unit prices on various commodity descriptions. Will you [fol. 329] state the basis of the data which you have shown here? You say records of the Association of American Railroads. In what form are those prepared?

A. Well, these are on basis of reports rendered by representative roads in the Southern Region to the Association of American Railroads, and the data was first introduced by Dr. Parmalee in Ex Parte 148, but it is a current statement that is kept current, and I quote the data for these particular commodities as reflecting the general situation in this territo

Q. On Nos. 26 and 27, perhaps you have answered this, but the average revenues from passenger traffic shown on those statements include furlough fares and troop train movements?

A. Yes.

Q. If any?

A. Based on total revenues.

Q. On statements 24 through 27, you show statistics of operations for passenger-travel in the State of North Carolina with the accounts of the carriers except in such a way —are the records kept in such a way that you were able to make an actual separation between North Carolina traffic and other traffic?

A. This is not North Carolina traffic. It is system traffic. The heading states "Railroads operated in North Carolina." It does not state that this data is state data.

[fol. 330] Q. You mean system data?

A. Yes. These are system statistics of roads that operate in North Carolina together with other states.

Q. Your Exhibit No. 12, which deals with revenues and expenses, is my inference correct that through those pages where you have shown total operating revenues, total operating expenses, you have dealt with system operations, including freight, passenger, and other statistics?

A. Yes, sir. These are total revenues and expenses.

Q. No separation?

A. No.

Mr. Hillyer: Mr. Examiner, my questions have been for the purpose of clarification. These exhibits were not introduced or circulated prior to the hearing, and I have not had time to study them carefully. Overnight I would like to look over these exhibits and it may be necessary to cross-examine the witness in detail later on, or it may be necessary to rebut some of this evidence. I would like the privilege overnight to consider what course to request.

Exam. McGrath: Will Mr. Tassin be available tomorrow for further cross-examination?

Mr. Clark: Yes.

Exam. McGrath: Is there any objection?

Mr. Clark: If you want to call him back tomorrow, it will be agreeable.

[fol. 331] Exam. McGrath: You may do that. Are there any further questions of Mr. Tassin at this time? No response.)

I want to ask you one question in connection with statement No. 3, of your Exhibit No. 9, where you show rate of return from both freight and passenger and other allied services. Have you made any study or investigation which would enable you to state what the rate of return from pas-

senger revenue is of the Southern roads, class 1 roads, in relation to the investment in railway property used in transportation services?

A. No, sir. There is so much of the property that is used in common and some that is solely passenger and some that is solely freight, and there isn't any separation available.

Exam. McGrath: You haven't undertaken to make or work out any separation?

The Witness: I don't accept the pro-rate basis that is ordinarily used of pro-rating investment in proportion to either expenses or revenues.

Exam. McGrath: I have no further questions.

By Mr. Hillyer:

Q. Mr. Tassin, do I understand your answer correctly that the Interstate Commerce Commission has employed a formula for the separation of expenses between freight and passenger and that you do not subscribe to that formula or sanction its use; is that correct?

A. Not in splitting investment as between what is re- [fol. 332] quired for freight and what is required for passenger.

Q. Have you, or is there available a known method of making the separation which would be satisfactory to your mind?

A. No, sir. It would have to separate what is direct freight, direct passenger, and common, and you would have to find some method of determining the relative use of the common by the two services which would, of course, vary from month to month and day to day.

Mr. Hillyer: That is all.

Exam. McGrath: Any further questions?

Mr. Clark: No.

Exam. McGrath: The Exhibits 9 to 12, inclusive, are received in evidence subject to the objections noted on the record.

(Respondents Exhibits 9 to 12, inclusive, witness Tassin, received in evidence.)

Exam. McGrath: You are excused.

(Witness excused.)

Mr. Gwathmey: Mr. Examiner, counsel for the OPA stated that in connection with his cross-examination of Mr. Tassin he would like to ask representatives of the Atlantic Coast Line and Seaboard Air Line certain questions about one of Mr. Tassin's exhibits. Those gentlemen are here present, and if counsel so desires, I will be glad to call them for that purpose.

[fol. 333] Mr. Miller: I would appreciate it.

E. A. Anderson was sworn and testified as follows:

Direct examination.

By Mr. Gwathmey:

Q. Mr. Anderson, before you are questioned by counsel for the OPA, I will ask you to state your name and residence, and your official railroad position.

A. My name is E. A. Anderson, Wilmington, North Carolina, assistant comptroller for Atlantic Coast Line.

Mr. Gwathmey: Mr. Miller, the witness is available.

Cross-examination.

By Mr. Miller:

Q. Is the Atlantic Coast Line paying excess profit taxes to the Federal Government?

A. It is.

Q. Can you tell me the exact or approximate percentage bracket in which those excess profit taxes are accruing?

A. For the year 1942, the Atlantic Coast Line was in the 90 per cent bracket, but being able to take advantage of debt retirement, we got nine per cent off so we paid a net of 81 per cent.

Mr. Miller: That is all I want to ask.

Mr. Gwathmey: If you want to say anything else, go ahead.

The Witness: About the 1943 situation, probably you would be interested in that. Last year we paid a Federal income tax of $21,600,000. It is true that our revenue this [fol. 334] year has increased to some extent, but so have

our expenses. This year our Federal income tax will run in the neighborhood of fifty-three to fifty-five millions of dollars, in excess of thirty millions of dollars, which will be excess profit tax.

Bear in mind that our revenues did not increase in proportion to warrant an increase in taxes of that much money. Let me say for the year 1942, the amount of revenue reflected by the Atlantic Coast Line Railroad Company is abnormal from a tax standpoint, granting you that 1942 was an abnormal year from an operating standpoint as well. These excess profit taxes are based in our case on equity, increased capital that goes through a complicated computation of dollars put in the corporation as well as accumulated surplus and a few other things, a division of investment between what the tax law refers to as admissible and inadmissible and what have you. Through that you compute exces profit credit. If you do not consume that credit, you are allowed to carry over the unconsumed portion of it. The years 1940 and 1941 being poor years in the railroad world, we had an accumulation to carry over. Incidentally, you can go back three years under the law, so we carried over some twenty millions of dollars, and having used that in computing our tax for 1942, we have no carry-over in 1943. In the year 1943, we could have the identical dollar for tax purposes, and we will have paid 81 per cent more using last year's rate on the same amount [fol. 335] of money or in excess of some sixteen millions of dollars more on the same dollar than we would without that credit. This year we have no credit so you can see on the same dollar what it is going to do to our revenue.

I thought I would mention that, because it is an interesting feature in taxes.

By Mr. Miller:

Q. What bracket will that put you in for 1943?

A. It puts us at the peak.

Q. A hundred per cent?

A. No. There is no hundred per cent under the Internal Revenue Code. Your computation of income for excess profit taxes has a limit of 80 per cent, but if you don't consume the 80 per cent of that income, your rate starts at 90, but the aggregate of the amount of excess profit taxes that you pay cannot exceed 80 per cent of the total income, so

we were in the 90 per cent bracket last year, and with our debt retirement taken off, that left us 81 per cent. It meant that every dollar we earned 81 cents of it went into taxes after we cleared up the stage.

Q. Mr. Tassin's exhibit which he derived from the audit department of your road shows that the estimated loss of your North Carolina intrastate revenue as of the end of September, 1943, would be about $96,000. Am I right in saying that if you had had that revenue, between 80 and 90 per cent of it would have been paid to the Federal Government?

[fol. 336] A. Yes, it would have increased the net operating income.

Mr. Miller: That is all I have, thank you.

(Witness excused.)

J. N. KING was sworn and testified as follows:

Direct examination.

By Mr. Gwathmey:

Q. Just tell us who you are, please.

A. J. N. King, general statistician, attached to the Accounting Department, Seaboard Air Line Railway, and my residence is Portsmouth, Virginia.

Mr. Gwathmey: The witness is available for any questions.

Cross-examination.

By Mr. Miller:

Q. Is the Seaboard Air Line Railway paying excess profit taxes?

A. For the period covered by Mr. Tassin's exhibit, we did not.

Q. Will you be paying excess profit taxes for 1943?

A. Possibly, yes, but our road is in receivership, and we are involved in quite a bit of litigation with our various mortgagees in default, and until the accounts are finally closed and certain legal questions are settled, we have no idea what our income tax or excess profits will be in 1943.

Q. Do you have any accruals that you put on your books for that purpose?

A. We have accrued for Federal taxes through the month [fol. 337] of November, we have accrued for Federal taxes, which includes income, surtax, and excess profit taxes, $14,300,000.

Q. Appreciating the difficulties you have, can you make an approximation of what you will actually pay, and in what bracket are the excess profit taxes? Have you made your accruals; can you give me that?

A. I cannot. I can furnish it in the morning, but I can't tell you now. I am not the tax man. We have a general tax accountant who figures these and advises the auditor who makes monthly accruals. I am not familiar with what bracket he figured excess profit taxes. I can get that for the record by morning if it is necessary.

Q. In view of the fact that the estimated loss for your line is the second highest given in Mr. Tassin's exhibit, I would like to request that you get that if you can.

A. I will be glad to.

Mr. Miller: Will it be all right to report that in the morning?

Exam. McGrath: Can you get it by morning?

The Witness: Yes, sir.

Exam. McGrath: Is that satisfactory to the respondents?

Mr. Gwathmey: Yes. It isn't the second highest. It is the third highest.

Exam. McGrath: If that is all, you are excused.

(Witness excused.)

[fol. 338] J. D. Makinson was sworn and testified as follows:

Direct examination.

By Mr. Gwathmey:

Q. Will you give your name, your residence, and your railroad position?

A. J. D. Makinson, Norfolk, Virginia, general passenger agent, Seaboard Air Line Railway.

Q. What in a general way is the nature of your duties?

A. In charge of the ticket and tariff and rate department of Seaboard in Norfolk, including, since the war started, military, having jurisdiction over the system of the Seaboard.

Q. Does your jurisdiction cover the entire system?

A. Entire system.

Q. Including the lines in North Carolina?

A. Including all lines in North Carolina.

Q. What is the approximate mileage of the Seaboard system?

A. 4,184.

Q. And does it operate in a number of states besides the State of North Carolina?

A. Virginia, South Carolina, Georgia, Alabama, and Florida, as well as North Carolina.

Q. And your mileage in North Carolina is what?

A. 630, about 15 per cent.

Q. You heard the testimony given by Mr. Barry of the Southern, did you not?

[fol. 339] A. I did.

Q. Do you wish to make some brief statements on behalf of the Seaboard somewhat along the lines that were touched upon by Mr. Barry? In the first place, tell us something about your ownership of coaches and air conditioned equipment and things of that kind.

A. Well, in the winter of 1933 Seaboard commenced its modernization program of air conditioning and putting reclining seats in coaches. At the present time our actual ownership is—not leased equipment—is 103 coaches, of which 71 are air conditioned; combined passenger and baggage cars, 46; air conditioned 23, and of dining car ownership of 37, 33 are air conditioned.

Q. Are these coaches and other cars that you have mentioned used in intrastate transportation as well as interstate?

A. Yes. They are used in interstate and intrastate commerce. Practically all of our trains run both interstate and intrastate. There is no separation made except on some few branch lines which still have non-air conditioned equipment.

Q. Whatever the equipment may be, do interstate and intrastate passengers commonly ride on the same train?

A. They do. There is no difference in the equipment of the through trains. They run interstate and intrastate.

Q. What can you tell us about the experience of the Seaboard in the handling of extra trains for military movements?

[fol. 340] A. Well, our experience has been along the lines of the other larger southeastern railroads. We have a large number of camps on the Seaboard, and while the loaded movements of military trains are very remunerative, the handling of these trains is also very expensive, more expensive than the operation of regular daily trains. For instance, in the month of September, which was a very heavy month, we——

Q. 1943?

A. 1943. We handled 361 extra trains over the entire system; 265 of them were special military trains; 34 with sections of regular trains, and 62 of these extra trains were deadhead equipment trains. Now, in handling a loaded military train, while you will see one carrying five hundred passengers, you will say, "Well, that is $15 a mile", but it is not all that much profit. We might have to handle that pound crew four times, and in practically all cases, two times to handle that one loaded movement, because you can't run an engineer and crew from one terminal to another and turn him right back with another loaded movement. The labor unions have contracts which prohibit that. It is not all profit in these military trains.

Q. What can you say as to the extent, if any, to which the Seaboard has found it necessary to increase its personnel under prevailing conditions?

[fol. 341] A. Well, our personnel and ticket offices in outside service offices, and in the general office, have been increased—well; in some cases over a hundred per cent, sometimes less, but one of the worst causes of the increase in expenses is that you have got to just about hire two for one, because the help is inexperienced. It takes years to teach people to sell tickets properly, and that shows an undue increase in personnel expense.

Q. Mr. Makinson, unless you have something else of a general nature that you wish to say, I will ask you if you have prepared some exhibits similar to those offered by previous witnesses showing illustrations of the difference

between the interstate and intrastate fares at the present time?

A. I have one statement of three sheets here.

Exam. McGrath: This will be Exhibit 13.

(Respondent's Exhibit No. 13, witness Makinson, marked for identification.)

By Mr. Gwathmey:

Q. Mr. Makinson, please proceed briefly to explain this Exhibit No. 13.

A. The first sheet of No. 13 indicates how the lower intrastate fares in North Carolina makes it possible for the passenger to beat the fare, as we say, in rebuying; from Raleigh to Atlanta, the through interstate fare is $9.31, which can be cut 80 cents by the passenger buying to Monroe, which is a division point, and rebuying.

The second sheet shows how the lower fares intrastate [fol. 342] in North Carolina causes two passengers traveling on the same train to pay separate rates per mile for that part of the trip in the State of North Carolina. This statement shows that an interstate passenger from Henderson, North Carolina, to Chester, South Carolina, pays for that part of his trip from Henderson to Monroe, $1.04—it ought to be Monroe, N. C.

Q. Monroe, North Carolina, instead of South Carolina?

A. It should be, yes, sir. It shows that the passenger interstate will pay between Henderson and Monroe, $1.04 more than the intrastate passenger pays between the same points, and the third sheet, I have made to indicate that a passenger or person living in Roanoke Rapids, North Carolina, who desires to go to Norfolk or Portsmouth to ship pays a coach fare of $1.83, whereas, if the same person goes from Roanoke Rapids to Raleigh to shop, he pays $1.55 for the greater mileage.

Q. Is that all you have to say?

A. I would like to say this, that in these various hearings, I have been asked how can you prove that passengers do defeat the fares. I do know they do it. We have eliminated certain fares at various times, because we found passengers were doing it. Last March before we had the increases in some of the other states, we felt it was prevalent to the extent that our general office, in view of the reports reaching us issued a specific letter to all interline

ticket agents, reminding them that it was unlawful to assist [fol. 343] a passenger in defeating a through fare by assisting him and making computations and reservations on reserved seat trains and pullman trains.

Mr. Gwathmey: Mr. Examiner, may we ask that the exhibit which has been identified as No. 13 be received.

Mr. Miller: I make objection to that, your Honor, because sheets 2 and 3 contain a legal conclusion. They state that it results in a direct discrimination. I think that is a legal conclusion.

Mr. Gwathmey: We will be glad to change the words "direct discrimination" to the words "difference in charge."

Mr. Miller: That is all right.

Exam. McGrath: You withdraw your objection then?

Mr. Miller: Yes.

Exam. McGrath: It is received.

(Respondent's Exhibit No. 13, witness Makinson, received in evidence.)

(Discussion off the record.)

By Mr. Gwathmey:

Q. Do you wish to make one more statement?

A. I do.

Q. Proceed.

A. On Seaboard Railway train No. 18, of November 16, 1943, there were two passengers on the train, and I have the tickets that each one of them surrendered. One is an intrastate ticket from Norlina to Littleton, North Carolina. The other is an interstate ticket from Norlina to Ports- [fol. 344] mouth, Virginia. One man paid 1.65 a mile, and the other paid 2.2 cents a mile.

Q. You have those tickets?

A. Yes, sir. I have two more tickets.

Mr. Hillyer: Are those over different routes?

The Witness: Same train, starting in North Carolina, ending up in Virginia.

Here is another, two more tickets, train No. 9, starting on November 17th, ending November 18, 1943, two passengers on that train. One had a ticket from Raleigh to Hamlet, which was intrastate. He paid 1.65 cents a mile

for his ticket. Another passenger in the same coach had a ticket from Raleigh to Athens, Georgia, for which he paid $8.47, which was the rate 2.2 cents a mile plus the tax. I would like to offer those also.

Mr. Gwathmey: I don't believe it is necessary to offer those as exhibits, Mr. Examiner, if the record can show that the witness has produced in the hearing room the tickets to which he has referred.

Exam. McGrath: I think that will be sufficient.

Mr. Miller: We don't question them at all.

Mr. Gwathmey: That is all on direct.

Cross-examination.

By Mr. Miller:

Q. These last instances you gave were not instances of defeat of the intrastate fare?

A. No, discrimination.

Q. You say that you know of some of these instances [fol. 345] of defeating the interstate fare; am I correct? You did state you did know some of them?

A. I can't give you that in black and white, but I used to work on the refund desk. I have been in the same office thirty years. I know it goes on. I know it because of the way they send tickets in for refund. I had one within the last few weeks, a man had a ticket from Richmond to Macon, Georgia and back. He sends in part of it. He says that the conductor told him it was only so-and-so from Savannah to Macon, that he could get a refund. I know it goes on.

Q. Do you know how prevalent these instances are?

A. No, sir, I do not.

Q. Do you know whether it amounts to any substantial sum of money?

A. No; I haven't tried to count it up.

Mr. Miller: That is all I have.

By Mr. Hillyer:

Q. Mr. Makinson, you used the term in describing these troop movements, and I wasn't sure what you meant. If this picture that I drew in my mind was correct, I think you made some reference to extra crews and deadhead trains. In assembling coaches or cars for troop movement

at an army post, do you have to go around the country and bring in extra equipment deadhead; is that what you meant?

A. No. You mean the number of trains that I said, 62 deadhead trains. That meant solid trains, for instance, from——

[fol. 346] Exam. McGrath: You don't have to give points.

The Witness: Say from Richmond to Jacksonville, we run a solid train of empty cars to get a troop movement, so it will cut down actual revenue that you receive from the loaded movement from $15 a mile to maybe $4.00 a mile.

By Mr. Hillyer:

Q. In cases where there is an order for a large troop movement, do you sometimes have to bring in empty trains from various directions in order to assemble enough for the movement?

A. Yes, sir; sometimes we do, and sometimes we don't. The army tries to co-ordinate movements so there won't be an excess of deadhead, but when you get a whole division movement, say, 15,000 men going from one place to another, you don't have the number of cars at one place. That is the kind of situation that calls for excess deadheading.

Q. You can't take cars off the regular trains for those movements, can you?

A. We have done that. We have taken cars by orders of the War Department, we have taken cars off the regular trains and moved troops in them, a Port of Embarkation movement.

Q. Does it happen at times that there will be a concentration of cars for large troop movement, and then some question of transportation perhaps water transportation arises where that order for a particular date may be cancelled, and all those cars have to be moved back out again [fol. 347] which came in empty?

A. In terms of passenger equipment?

Q. Yes.

A. Well, if I knew just a little bit more what you were getting at, I might answer it better. I have handled all that stuff. There are times when there is an excess movement of cars due to changes in plans, weather conditions, fog. Fog held a train up two days once. A fog held the inbound steamer up for two days and our equipment was

waiting there for the people to come in. That may be what you mean. That is an act of God, and we don't know how to help it.

Q. It is possible then to have inbound deadhead movements of equipment and then have outbound deadhead movement too or a long delay due to causes that were unforeseen; is that correct?

A. As I said, the War Department is now and the Navy, too, has an elaborate set up in Washington and around the Country to eliminate as much as possible the excess deadheading and will coordinate movements, maybe delay a movement a few days in order to use the same equipment on a return trip. Where the excess cost comes in on handling troops is crews. That is where the excess cost comes in, because you can't turn a crew. Do you know what first out means? If you don't, that means the first crew out of a terminal has to come out first. You can't use the inbound crew. You have got to use the first crew on the [fol. 348] board to go out. That is where excess cost comes in in handling troops.

Q. I think in the previous North Carolina case some one testified that the troop movements when they do get to rolling take precedence over other passenger and freight trains, and you have to delay other trains where necessary to let troop movements through; is that correct?

A. It depends on the class of troop movement. There are certain classes of troop movements which, as you know, must be given preference. When those do develop, everything else is put in the siding for them, and it delays all other trains. It doesn't happen very often.

Mr. Hillyer: That is all I have.

By Mr. Hillyer:

Q. Are the troop movements over your line in North Carolina mostly in interstate commerce?

A. I haven't made a study to see what the percentage of intrastate North Carolina movement is, but I know it is lower than the interstate movement, because, for instance, on the Seaboard, the largest concentration of camps is in Florida, so naturally more of our movements are to and from Florida than they are within the State of North Carolina, but there are some large camps in North Caro-

lina, and we have quite a few intrastate movements between camps in North Carolina.

Exam. McGrath: If the increased fare which the appli- [fol. 349] cants are seeking here had been in effect during the period shown by Mr. Tassin's exhibit No. 9, would the Seaboard—would you as a responsible official of the Seaboard say whether or not the amount of those losses would be recovered, or would some of that so-called loss of revenue be diverted to other means of transportation or discourage travel?

The Witness: Mr. Examiner, I don't believe——

Exam. McGrath: In other words, what would be the effect on infrastate passenger travel of increasing the fares from 1.65 to 2.2 cents a mile?

The Witness: I have asked myself that a lot of times, and I have asked a lot of people to see how they feel about it, and I agree with Mr. Barry, if we should increase the coach fare in North Carolina even by the one-third we are asking under present conditions I don't believe it would keep anybody off the train. If it did, it may be some few that should stay home anyway. That is my honest opinion about it.

Exam. McGrath: Any further questions? (No response.) You are excused.

(Witness excused.)

Mr. Gwathmey: Mr. Examiner, Mr. King can answer Mr. Hillyer's question right now about excess profit tax, if you wish.

Exam. McGrath: All right.

Mr. King: In 1943, we figure we will be in the 90 per [fol. 350] cent bracket, but we have losses that we can take a ten per cent postwar refund, so tax accruals are based on 81 per cent.

Exam. McGrath: We will recess until 9:30 tomorrow morning.

(At 5:15 o'clock, p. m., December 28, 1943, the hearing adjourned until 9:30 o'clock, a. m., December 29, 1943.)

[fols. 351-352] Before the Interstate Commerce Commission

No. 29036

North Carolina Intrastate Coach Fares

Raleigh, North Carolina, December 29, 1943. 9:30 a. m.

Before John P. McGrath, Examiner

Met pursuant to adjournment.

APPEARANCES:

As heretofore noted.

[fol. 353] Proceedings

Exam. McGrath: The hearing will be resumed. Is there any further testimony for respondents?

Mr. Clark: Mr. Examiner, we have no further witnesses. There are some decisions of the Commission which it would be my purpose to use on brief. I don't know whether you feel that ought to be referred to here or whether just putting them in brief is sufficient. I can give you citations to them if the gentlemen would like. State Corporation Commission of Virginia versus A. & R. Railroad, 161 I. C. C. 273; Class Rates within the State of Georgia, 209 I. C. C. 586; Surcharge on Intrastate Traffic within North Carolina, 194 I. C. C. 309; Intrastate Class Rates in North Carolina, 238 I. C. C. 225; Passenger Fares and Surcharges, 214 I. C. C. 174; and, of course, I do wish to especially introduce the decisions of the Commission in Ex Parte 148, the original decision and the orders postponing the surcharge, but continuing the passenger increases until January 1, 1944, and the further suspension of six months of the freight increases until June 30, 1944, inclusive.

I think the two decisions of the Commission on Ex Parte 148 are reported at 240 I. C. C. 545, and I think the other one is 255 I. C. C. 357. I think those are the right citations. Anyway reference to the docket 148, I think, would be sufficient.

Exam. McGrath: Is there any further cross-examination of any of respondents' witnesses by the North Carolina [fol. 354] Commission?

Mr. Hillyer: No, sir, no further cross.

Exam. McGrath: I want to ask one further question of one of respondents' witnesses, Mr. Barry. Didn't he testify with respect to necessity of making reduction in fares on the land grant?

Mr. Clark: Yes, sir

Exam. McGrath: I don't recall that the record shows whether there is any land grant mileage in North Carolina. Is there somebody qualified to give us that information?

Mr. Gwathmey: Mr. Makinson could give you that.

(Discussion off the record.)

J. D. Makinson testified further as follows:

Redirect examination.

By Exam. McGrath:

Q. What is the fact, Mr. Makinson, as to whether there is any land grant mileage on any of the railroads in North Carolina, first, with respect to your railroad?

A. None on the Seaboard in North Carolina, and I know of none on any other railroad; however, there are cases where the effect of the land grant causes deduction from revenues accrued in North Carolina on certain competitive conditions.

Q. Would that affect intrastate travel or interstate only?

A. Only interstate travel.

Q. Are you able to be more specific as to those instances in [fol. 355] which it does affect the fares?

A. Yes, take Wilmington——

Q. You mean interstate traffic?

A. Yes. Take Wilmington, North Carolina, to New Orleans, the greatest through land grant over a published route would be to Jacksonville and then the land grant line from Jacksonville to Flummerton, Alabama, and the lines through Atlanta. Of course, under equalization of movement, it equalizes that land grant so there would be some slight deduction—for instance, over the Seaboard Air Line from Wilmington to Atlanta, or over the Coast Line from Wilmington to Columbia through Atlanta to equalize the deduction through Jacksonville.

Exam. McGrath: Any questions? (No response.) You are excused.

(Witness excused.)

(Discussion off the record.)

Mr. Clark: I would like to recall Mr. Barry to the stand to furnish the tariff references to the data shown on his exhibits 2 and 3, which I was given permission, if you recall, to do.

E. E. Barry testified further as follows:

Redirect examination.

By Mr. Clark:

Q. Mr. Barry, I hand you a paper which is marked merely [fol. 356] for convenience, Exhibit 2.

Exam. McGrath: Suppose we designate that as Exhibit No. 2-A.

(Respondent's Exhibit 2-A, witness Barry, marked for identification.)

By Mr. Clark:

Q. And which purports to indicate some references to passenger tariffs. Will you please tell me what that is?

A. This memorandum was prepared to give tariff reference where the fares shown in Exhibit 2 were taken from, and the Interstate Commerce Commission reference to those tariffs.

Q. This is the tariff reference for the fares used on your Exhibit 2; is that right?

A. Yes, sir.

Q. I hand you another single page statement identified as Exhibit 3-A, which appears to be somewhat similar to 2-A.

(Respondent's Exhibit 3-A, witness Barry, marked for identification.)

Q. Tell us please what that is.

A. This memorandum shows similar tariff reference for the fares and distances shown in Exhibit 3.

Q. At the lower lefthand corner of Exhibit 3-A, we have "And Official Guide". I understand that covers a few instances for which you did not have foreign roads mileage tariffs?

[fol. 357] A. That is correct.

Q. Can you explain whether that happened often or infrequently or what?

A. In the total exhibit not exceeding five times.

Q. Was that where you had a through rate quoted and a mileage figure which involved some foreign line and didn't have their mileage tariff?

A. That is correct. We didn't have that here in Raleigh and for that reason, we checked by the Official Guide.

Q. Tell us, Mr. Barry, the basis of the Official Guide distances in respect to passenger mileages?

A. Distances shown in the Official Guide are furnished by the Passenger Department generally of the railroads and that mileage is taken from information on records furnished by the engineering department which is accurate mileage distance.

Q. Does it conform to the mileage distances used in passenger fares?

A. Yes, sir.

Mr. Clark: That is all.

Exam. McGrath: The exhibits are received in evidence.

(Respondent's Exhibits 2-A and 3-A, witness Barry, received in evidence.)

(Witness excused.)

Mr. Clark: The respondents now rest their case.

Exam. McGrath: The North Carolina Commission may [fol. 358] proceed.

FRED C. HUNTER was sworn and testified as follows:

Direct examination.

By Mr. Hillyer:

Q. Will you state your name, address, and occupation, please?

A. My name is Fred C. Hunter. My address is Raleigh, North Carolina. I am a member of the North Carolina Utilities Commission.

Q. Will you proceed in your own way, Judge, to state the position of the North Carolina Commission in this investigation?

A. Chairman Stanley Winborne, who was prepared to testify in this case and desired to testify, is the victim of the flu epidemic at this time and cannot be here. In his absence, I would like to state briefly the position of the North Carolina Utilities Commission with respect to its order which was issued in Docket No. 2789.

The railroads operating within the State of North Carolina petitioned the Utilities Commission for authority to increase intrastate fares. This petition came on for hearing before the Commission on May 20, 1943, and was heard.

The main issue presented in this case was whether or not the existing intrastate fare of 1.65 per mile should be increased to 2.2 cents per mile. Some evidence was offered in [fol. 359] that case oral in its nature and also considerable testimony in the form of exhibits. The Utilities Commission considered very carefully all the testimony which was presented on behalf of the petitioners, and it could not find from the testimony, facts which would justify the increase of the coach fares to 2.2 cents or to any other figure. In other words, the testimony presented to the Commission at that time was not such that it could make any calculation or arrive at any specific figure which it felt would justify it in fixing the proper rate.

The testimony as we viewed it justified a figure of 1.65 or lower, just as much as it did any point above that figure. The Commission, therefore, made its findings of fact, and it issued its order which was not final in nature but was in the nature of an interlocutory order, and in this order it advised the petitioners that it proposed to petition the Interstate Commerce Commission to make an investigation with respect to interstate rates of carriers involved, interstate rates to and from points in North Carolina and through North Carolina.

As I say, this order was in the nature of an interlocutory order. Its effect was to defer any ultimate decision in the case until such time as the Interstate Commerce Commission might pass upon its petition and perhaps supply it with what it considered needed information which it did not [fol. 360] have.

This order of the Utilities Commission did not in any manner close the door to the petitioners. It left it open, and

the door, in fact, is still open to them. There was no petition or request or suggestion on the part of the petitioning railroads to reopen the case or to rehear it or to reconsider the findings of fact. On the contrary, before the Interstate Commerce Commission had an opportunity to consider our petition which was addressed to it for the investigation of the interstate fares, the petitioners themselves filed a petition with the Interstate Commerce Commission, which resulted in the present investigation.

I think it probably would add something to an understanding of our position and the order which we made in Docket No. 2789 to briefly group and number the points which the Commission considered and which gave it some concern. These points being briefly these:

1. That the cost or statistical evidence was rather limited and general in its nature. It related to southwide or system operations and not to operations within the State of North Carolina. This was particularly necessary as we viewed the matter in view of the fact that our Commission is limited to the State of North Carolina, and the problem presented before us was a problem of arriving at just and fair and proper charges for operations within the state.

[fol. 361] 2. While there was some statistical data with respect to North Carolina, there was no attempt made on the part of petitioners to prove the cost of coach fare service in the State of North Carolina, or for that matter, in any other state.

3. There was *to* attempt to determine the cost separately of pullman car service, of mail service, and express service, troop train service. There was no evidence which tended to show that these classes of services were being operated at fares which would produce net passenger operating losses or gains.

There was considerable testimony in the hearing before our Commission to the effect that troop train movements were expensive, and just how expensive, we were not advised, but left with the impression that they were rather unusually expensive as compared with other types of coach service. Whether or not this class of service bears its proper burden of coach train operations within the State was not developed.

Q. Judge Hunter, in the proceeding before the State Commission, was there any issue presented to you with respect to the fares or charges for troop movements?

A. No, sir, there was not. That is a matter of contract between the Federal Government and the railroads. It is a matter that was not presented to us. We did not consider it.

Q. You do not regard your interlocutory order as pro- [fol. 362] hibiting or preventing any change one way or the other in the charges paid by the Government for troop train movements; is that correct?

A. That is correct. I may add further that there is no attempt to show that the difference between coach fare service and pullman service in relation to the difference in cost of these two classes of service, the difference in charges being considerable. The Utilities Commission was not advised of the cost of passengers per coach mile in North Carolina, neither was it advised of the revenue per passenger per coach mile.

The things I have mentioned are things which did not appear in the testimony, and then there was this thing that did appear quite definitely, that was that the petition was not being based upon a need for the added revenue. On the contrary, it was not presented as a revenue case and it was so stated, I believe, by the petitioners themselves.

It also appeared that certain of the companies involved were receiving a net return on investment for the year 1942 of 5.7 per cent and more. In view of the testimony presented and the fact that the added revenue was not needed and in the absence of testimony on which the Commission could arrive at what it could satisfy its mind as being the just and proper rate on civilian coach fares in North Carolina, the Commission could not in good conscience increase or grant [fol. 363] an increase of intrastate fares.

Q. Did the evidence indicate that certain of the weak lines were in need of revenue?

A. Yes, sir. It appeared in the testimony that certain of the weaker lines did and probably could have justified an increase in rates on the basis of revenue.

Mr. Clark: May it please the Examiner, this is all most interesting, and I somewhat hesitate to raise an objection, bat it seems to me to be irrelevant and immaterial to the investigation of the Interstate Commerce Commission. The Judge has explained to us a good deal of what he says was in-

the record or was not in the record. If the Commission would like to introduce the record, that could be done. I certainly don't think it material, and it is largely argument, that the Judge has put forward here as to why the North Carolina Commission entered the so-called interlocutory order. That is irrelevant and immaterial to the issue here. No matter what good faith it may have viewed the record before it, the fact remains that the effect of the order was to prevent the petitioning roads from increasing their rates or charges, and that is what we are investigating now. This is water over the mill.

Exam. McGrath: While that is true, the Examiner believes the North Carolina Commission is at liberty to state its position and give reasons for its position. That is what I [fol. 364] think the witness has done. That is my understanding.

The Witness: We took that view of it.

Mr. Clark: I think if that is going to be based on the record, put the record in and let it speak for itself. We were not present—all of us were not present at the North Carolina hearing, and this is an ex parte statement of what the record contained or didn't contain.

Exam. McGrath: Well, there is no issue of fact on that before the Commission, this Commission.

Mr. Clark: That is the point I had in mind. If you like to hear it, of course, it is all right.

Mr. Hillyer: We ask to have marked for identification an exhibit consisting of the petition of the North Carolina Utilities Commission for investigation of interstate fares, consisting of four pages, and appendix A thereto, which is the order of the North Carolina Commission in 2789, consisting of fourteen pages, and the appendix B, showing revenues, expenses, and operating ratios, and appendix C, showing the composition of revenue.

Exam. McGrath: That will be marked for identification as Exhibit No. 14.

(Protestant's Exhibit No. 14, witness Hunter, marked for identification.)

Mr. Hillyer: And appendix D, average revenue per passenger mile.

[fol. 365] By Mr. Hillyer:

Q. Are these true and correct copies of the documents which I have described?

A. They are.

Mr. Hillyer: We offer this in evidence as Exhibit No. 14, if the Examiner please.

Exam. McGrath: The exhibit is received in evidence.

(Protestant's Exhibit No. 14, witness Hunter, received in evidence.)

Mr. Hillyer: That concludes the direct examination.

Cross-examination.

By Mr. Clark:

Q. Let me ask you a question or two, Judge. In your testimony you referred to the order of your Commission of July 8th, this year, as an interlocutory order, and in that connection, said that the door of your Commission is always open, you recall that?

A. Yes, sir; that is correct.

Q. The fact still remains that by the action you took in your order, you left the petitioning railroads who are respondents here in the position where they could not increase their coach fares from 1.65 cents to 2.2 cents per mile; is that correct?

A. That is correct. That has not been granted.

Q. You spoke of the petitioning railroads here having rushed to the Commission, the Interstate Commerce Commission, with their 13th Section petition before you had opportunity to file your petition that you had referred to in [fol. 366] your order of July 8th. Do you remember saying that?

A. I think you misunderstood me. The point I made was this, that we had advised the petitioners in our order that we proposed to file such a petition with the Interstate Commerce Commission and did file such petition, but before the Interstate Commerce Commission had an opportunity to consider and pass upon that petition that you filed your petition.

Q. In other words, let the dates speak for themselves. The petitioners filed their petition with the Commission on

July 22nd, as I recall it, and your Commission filed its petition with the Interstate Commerce Commission on July 8th; are those dates correct?

A. I do not know.

Q. Your Exhibit No. 14 shows you filed your petition on July 8th; is that correct?

A. That is correct.

Q. The record of the docket will show when the ot-er was filed?

A. Yes, sir.

Q. You made a point of south—used the expression of south-wide showing. I want to ask you—let's take a situation within the four corners of the State of North Carolina, and it is the charges in the state intrastate that are being considered. Do you think it would be possible to make any kind of a case that would every satisfy your Commission if nothing but rates within the State of North Carolina or [fol. 367] conditions within the State of North Carolina were considered when that petition was brought; do you think you would ever be satisfied with such a showing, Judge?

A. We probably would not have been entirely satisfied. I think we could probably have approached a better solution with evidence a little more to the point with reference to the conditions within the State of North Carolina.

Q. Wouldn't you be interested in knowing what was going on in Virginia on the one side of you and South Carolina on the other?

A. Yes, sir.

Q. Wouldn't that extend it somewhat beyond the confines of the State of North Carolina?

A. It has some benefit, yes.

Q. If that is true, wouldn't it be even more helpful to go on to the State of Georgia, Alabama, Tennessee, and other states in which these same railroads that are petitioning operate and are involved; isn't that more helpful?

A. No, sir, I wouldn't follow you there. It is helpful, but we couldn't base our decision on facts gathered from outside of the state.

Q. Let's come within the state. You have in the state a fare of 1.65?

A. That is correct.

[fol. 368] Q. What other fare within the state would you have compared that with, because you must recognize comparison of charges as perhaps the best test?

A. We would rather approach that, Mr. Clark, I should think from a showing of the cost per coach mile, and the revenue per coach mile in order to arrive at what would be a just rate in North Carolina.

Q. Do you appreciate the testimony here, Judge, in this case, and I am sure in all others, must have convinced you that these passengers interstate and intrastate are handled under the same conditions on the same trains?

A. That is generally true.

Q. Isn't it always true?

A. I thought of this, Mr. Clark, I was in hopes you might develop a little information that I would have liked to have had in connection with your case, and that is whether or not the greater portion of your interstate travel, which I believe according to the testimony is somewhat in excess of intrastate travel, the greater portion of that is not upon through trains which pass through the state, and if that travel is not, passengers travel entirely through the state on through trains, which is not comparable to the majority of travel within the state, and that these are better trains, better schedules.

Q. Your statement is you would like to have had that data?

[fol. 369] A. I was wondering whether or not that is true, whether or not the greater part of the interstate travel is not through the better trains and which passes entirely through the state.

Q. Did you say you would like to have had that showing before your State Commission?

A. I said that information would have been interesting to us now.

Q. I am talking to you about what happened before your Commission, and I am cross-examining you. Did you say you would prefer to have that?

Exam. McGrath: Are you undertaking to retry that case, and you objected to it, and now you are prolonging it.

Mr. Clark: Yes, sir; that is quite true. You permitted him to go on with it. I think I should investigate and find out what they wanted.

Exam. McGrath: I don't see any purpose to be served in that.

Mr. Clark: I felt compelled to carry it forward. We are in the position now of having had an Ex Parte statement of what they did and why they did it and what they wanted, and now I can't develop it.

Exam. McGrath: You are asking him what they wanted. That is beside the point, it seems to me.

By Mr. Clark:

Q. In North Carolina, confining your investigation, as you seem to indicate, you prefer to do it to the state, [fol. 370] you would have 1.65 for coach travel. Now, in comparison with that, wouldn't you have found 2.2 coach travel fare in effect on the Norfolk & Western Railroad?

A. Yes.

Q. If 2.2 was right for the Norfolk and Western, why wouldn't it be right for the other lines?

A. You are assuming, Mr. Clark, that it is right. We didn't arrive at that conclusion.

Q. It was in effect, wasn't it, and you took no steps to put the Norfolk and Western's 2.2 down to 1.65? You merely told these railroads by your action they couldn't increase theirs to the level of the Norfolk and Western; why was that?

A. 2.2 is the interstate rate.

Q. I ask you if the Norfolk and Western has a 2.2 passenger coach fare applicable within the State of North Carolina.

A. That may be true. I am not aware of the fact.

Q. Your answer is it is or is not, or you just don't know?

A. I don't know.

Q. Did you have any idea in speaking of costs how it would be possible to determine the cost of handling two passengers, one an interstate and one an intrastate, riding in the same seat and same car of the same train? Do you think that could be divided and determined to your satisfaction?

A. I don't know whether it could be or not.

Q. It would be a right good job, wouldn't it?

[fol. 371] A. I don't know.

Q. Are you accustomed to dealing with matters of this kind? Do you think that could be shown to your satisfaction?

A. I don't know, Mr. Clark, that it could in that particular instance.

Mr. Clark: Thank you, sir.

By Mr. Gwathmey:

Q. Judge, I don't want to prolong this. I want to ask you if you will be good enough to check with me one or two dates. You recall, do you not, that the interstate fare was raised to 2.2 cents per mile on October 1, 1942; that is correct, isn't it?

A. I think it is, Mr. Gwathmey. I am not positive as to the date.

Q. As you stated, as appears from your Exhibit No. 14, the railroads operating in North Carolina immediately thereafter; namely, on October 12, 1942, petitioned the North Carolina Commission for authority to increase the intrastate fares; that is correct, is it not?

A. You have reference now to the ten per cent?

Q. No, sir. I am talking about our petition to the Commission dated October 12, 1942, asking that the railroads be permitted to raise the intrastate fare from 1.65 to 2.2 thus putting it on parity with the interstate fare?

A. Yes, sir.

Q. Now, Judge, it appears from your Exhibit No. 14 that [fol. 372] the North Carolina Commission held its hearing on that petition on May 20, 1943?

A. That is correct.

Q. Does that not mean that a period of approximately seven months elapsed after the railroads had filed their petition with your Commission before we were given any hearing?

A. Yes, sir; that is correct.

Q. Your order was finally issued under date of July 8, 1943, which means, does it not, that a further period of about two months elapsed before we got a decision?

A. That is correct.

Q. Well, under those circumstances do you think it is altogether fair to the railroads to say that they rushed to the Interstate Commerce Commission?

A. You are not quoting my statement exactly correct. I don't think that statement was made.

Q. I may have misunderstood you. I thought you said the railroads rushed to the Interstate Commerce Commission with a 13th Section petition.

A. No. The only point I made about that was that the railroad companies were advised that the Utilities Commission proposed to file such petition with the Interstate Commerce Commission and that you filed your petition before the Interstate Commerce Commission had opportunity to consider and pass upon the petition of the Utilities Commission; that is the only point I made there.

[fol. 373] Q. Is not this true, however, that during all of that period, commencing with October 1, 1942, down to this very day, the railroads in North Carolina have been losing the revenue which they would have received if they had been permitted to put their fares in this state on the interstate basis?

A. They have not been permitted to increase fares to 2.2.

Q. Now, Judge, just one more question. Your Commission filed this petition dated July 8, 1943, with the Interstate Commerce Commission, asking for an investigation of interstate fares. Was that petition ever served on the railroads operating in North Carolina?

A. I couldn't answer that, Mr. Gwathmey. We will have a witness who will be prepared to answer that. I don't have that information.

Q. Judge, will you permit me to say that when you filed this petition here, a copy of it as a part of your Exhibit No. 14, it is the first time I have yet seen that petition. Mr. Clark has already made a part of this record by reference the answer which the railroads filed to the petition of the OPA and petition of the Alabama Commission. We did not specifically answer the North Carolina Commission, but stated in our communication to the Interstate Commerce Commission that we understood such a petition had been filed.

That is all.

[fol. 374] Exam. McGrath: Any questions on redirect?

Mr. Hillyer: No.

Exam. McGrath: You are excused.

(Witness excused.)

H. H. NICHOLSON was sworn and testified as follows:

Direct examination.

By Mr. Hillyer:

Q. Will you state your name, address, and occupation?

A. My name is H. M. Nicholson. I am director of traffic of the North Carolina Utilities Commission. I have been with the Commission for approximately six years. Prior to that time, I had experience in industrial, commercial, and carrier traffic work for about ten years.

I have three small exhibits which I would like to comment on briefly. The first one is headed, "Exhibit Containing List of Passenger Trains Formerly Operated Within North Carolina Which Have Been Discontinued Since January 1, 1941."

Exam. McGrath: That will be 15.

(Protestant's Exhibit No. 15, witness Nicholson, marked for identification.)

The Witness: This Exhibit No. 15 shows intrastate passenger train operations which have been discontinued, some of them permanently; others on temporary basis to permit use of the equipment at other places.

[fol. 375] It might be added that one of the respondents, the Norfolk and Southern Railway Company operates only one passenger train per day in each direction between Raleigh, North Carolina, and Norfolk, Virginia, a total distance of 243 miles, of which 211 miles is within the State of North Carolina. The main line of the Norfolk and Southern extends south of Raleigh into Charlotte, a distance of 157 miles, but passenger service has not been offered over that part of its route for several years.

Recently within the past two months, the Commission has authorized the Atlantic Coast Line Railroad Company to substitute an interstate passenger train service on its route between Wilmington and Fayetteville, and at the present time, application of the Seaboard Air Line Railway Company is pending before the North Carolina Commission for authority to discontinue mixed passenger train service between Vickerson and Oxford.

Exam. McGrath: Both in North Carolina?

The Witness: Yes, all in North Carolina. I might add to that Winston-Salem Southbound, one of the respondents

here, whose entire route lies within the State, has offered no passenger service for several years in North Carolina.

The North Carolina Commission's order in Docket 2789 did not close the door to the carrier—in fact, the order rather clearly indicates that some of the lines, particularly [fol. 376] the Norfolk Southern and Clinchfield were under the evidence submitted, entitled to an increase.

Several months ago a traffic department representative of the Norfolk and Southern inquired about the simple procedure necessary to get the increase indicated that they might be entitled to in the order. They were told it would be necessary to file a simple informal application, setting forth their need, but they have not done that to this date.

By Mr. Hillyer:

Q. Mr. Nicholson, has the Winston-Salem Southbound operated passenger service during the past few years?

A. No, sir.

Exam. McGrath: What is the length of that line in North Carolina?

The Witness: Winston-Salem Southbound, it shows on one of these exhibits.

Mr. Clark: It shows on one of Mr. Tassin's exhibits. It is on Statement No. 6 in Mr. Tassin's exhibit, or No. 5, one of those two.

By Mr. Hillyer:

Q. Has the Norfolk Southern increased its fares?

A. No, sir. They apparently elected not to.

I have another exhibit headed, "Average Revenue Per Passenger Per Mile by Classes of Service Received by Class 1 Rail Carriers in the Southern Region During the [fol. 377] Thirty-One month period, January 1941 to July, 1943, inclusive."

Mr. Hillyer: We ask to have this marked as Exhibit No. 16.

Exam. McGrath: All right.

(Protestant's Exhibit No. 16, witness Nicholson, marked for identification.)

By Mr. Hillyer:

Q. Is any comment needed?

A. This Exhibit No. 16 shows the average revenue per

passenger per mile for a period of thirty-one months. The increase of ten per cent effective February 10, 1942, is reflected at that date, and the additional larger increase of 33 1/3 per cent effective interstate in October, 1942, is shown in the averages.

We have been unable to find a report showing a corresponding increase in coach expense or to show just what the coach expense is.

Mr. Gwathmey: May I ask whether Exhibit No. 16 covers both interstate and intrastate travel?

The Witness: Yes, it does.

I have another exhibit headed, "Composition, Both Actual and Relative, of Revenue Received from Passenger and Allied Services by the Class 1 Rail Carriers in the Southern Region During the thirty-one Month Period, January 1941 to July 1943, Inclusive."

Mr. Hillyer: We ask to have that marked Exhibit No. 17.

Exam. McGrath: Very well.

[fol. 378] (Protestant's Exhibit No. 17, witness Nicholson, marked for identification.)

The Witness: This Exhibit No. 17 consists of three pages, the first of which shows total revenue of Class 1 carriers in Southern Region on passenger service and as it is provided by various kinds of passenger and allied services.

Page 2 shows the percentage relation of the revenue from each service to the total revenue from all such services.

Page 3, by taking the 1941 monthly average shown on Page No. 1 as Index 100, this page shows the percentage relation to total passenger service revenue as to revenue from coach fares, parlor, and sleeping car fares, and services other than fares.

By Mr. Hillyer:

Q. Do your three exhibits show the source of the figures for each?

A. Yes, sir.

Q. Were these prepared under your direction?

A. Yes, sir.

Mr. Hillyer: Exhibits 15, 16, and 17 are offered in evidence.

Exam. McGrath: They are received.

(Protestant's Exhibits 15, 16, and 17, witness Nicholson, received in evidence.)

The Witness: I would like to make this comment while [fol. 379] it occurs to me. The first class fares, which as I understand it, are not involved here directly, the first-class interstate fare in North Carolina is 3.3 cents per mile, and the first class intrastate fare is three cents per mile; and in the State of Georgia intrastate the first class fare is 2.2 cents per mile, while the interstate first class fare is 3.3 cents per mile, and the condition that Mr. Clark referred to with respect to the Norfolk and Western, which extends down to North Carolina for a few miles from Virginia is a condition which has existed for some time prior to the attempt of the Southern lines to increase their fares. It existed also in northern Virginia at the same time in Southern Virginia the fare was quite different.

By Mr. Hillyer:

Q. Mr. Nicholson have you heard the testimony with respect to the extra expenses incurred in the movement of troop trains?

A. I heard the testimony yesterday by Mr. Makinson and also testimony before the North Carolina Commission. It seems to me that considerable stress was laid on unusual expense in handling troop trains and the one way empty mileage of such trains and concentration of that equipment and in giving those trains preference over all other trains.

Q. Now, in your opinion, would those expenses justify an increase in the civilian coach fares?

A. No. In my opinion the extra expense should be borne [fol. 380] by the type of service which creates it and shouldn't be added to some other service.

Q. During the past year or two, have there been any complaints or reports made at your Commission with respect to the nature of coach service being afforded by the railroads in North Carolina?

A. Yes, sir. We have had many general complaints about it from various sources.

Q. Have you had any experiences of your own which you might relate briefly?

A. Not many. I have endeavored to duck all unnecessary trips in the recent past. I did go down to Charlotte for a Joint Board hearing of the Interstate Commerce Commis-

sion some months ago and had quite a time getting a seat and was fortunate in getting a seat in the vestibule of one of the cars. I was afraid to leave it, because I think if I had ever left it, I would never have gotten it back because there were many people standing.

Q. Have you been authorized to speak for and represent the Charlotte Shippers and Manufacturers Association at this hearing?

A. Yes, sir. The position of that Association is that there should be no increase in the coach fares due to the deterioration of the service. It is quite anomalous to have an increase in the fares while the service is decreasing.

[fol. 381] Mr. Hillyer: That is all on direct.

Cross-examination.

By Mr. Clark:

Q. Mr. Nicholson, would you mind telling me the length of the Norfolk and Western's branch down to Durham that is within the state?

A. About fifty miles, I think.

Q. The branch that runs down to Winston-Salem, that is about sixty or seventy-five miles?

A. Yes, sir, I think it is.

Q. They have over a hundred miles of railroad within the state?

A. Not connected.

Q. In the two branches, of course?

A. Well, more than that. They have a little branch that runs down to West Jefferson. I don't believe they have passenger service on that.

Q. They do have passenger service on the Durham branch and the Winston-Salem branch?

A. Yes, sir.

Q. Would you say the service, the passenger service on the Norfolk Southern is as good or better than that, say, on the Southern Railway, the Coast Line, and Seaboard?

A. Well, of course, there is all classes on most of those roads except Norfolk and Southern. They have only one class, but Southern Railway——

[fol. 382] Q. (Interposing) I am asking you now about Norfolk and Southern in comparison with so-called trunk lines.

A. Norfolk and Southern has service that is better than some of the trunk line service.

Q. Can you designate any southern railway that is worse?

A. I can't do it except by hearsay, Mr. Clark. I think we will be able to do it later.

Q. You refer to complaints about the service on coach travel in North Carolina. I take it that was based on crowded conditions?

A. Partially, and partially on the—well, to use one expression, the filthiness of the cars is the way one man expressed it, and another man expressed it as a hazard. He referred to it as a hazard, but I didn't quite follow him there.

Q. The use of the car by the passengers creates what you call filthy?

A. Yes, and inattention by the employees of the railroad.

Q. Do you appreciate any difficulties the railroads have encountered in getting additional cars and equipment?

A. Yes. That is a matter of common knowledge. It is a matter of common knowledge that the railroads are doing a good job under the circumstances.

Q. You recognize also in cleaning cars, they are having some difficulty in getting help to do that work?

A. Yes, sir, I understand that.

[fol. 383] Q. Won't you agree with me that no one of the cars that you have in mind ever left a terminal in what might be termed a filthy condition; you would be willing to withdraw that statement, wouldn't you?

A. I don't think I made that statement. I did it by hearsay.

Mr. Clark: That is all.

By Mr. Gwathmey:

Q. Will you look at your Exhibit No. 17, Mr. Nicholson?

A. Yes, sir.

Q. Am I not correct in understanding that your Exhibit No. 17 is an exact duplicate of the statement of three pages, which was attached as appendix C to the North Carolina Commission's petition of July 8, 1943, to the Interstate Commerce Commission?

A. That is correct.

Q. Asking an investigation of the interstate fares.

A. That is correct, except that it is brought a little nearer up to the present date, a few months added to it.

Q. And was not that petition denied by the Interstate Commerce Commission on October 11, 1943?

A. Yes, sir.

Mr. Gwathmey: That is all I want to ask.

Exam. McGrath: If I understood your testimony correctly, you stated that the basis for the pullman fares in North Carolina intrastate is less than it is interstate?

[fol. 384] The Witness: That is true only with respect to one-way fares. It isn't true with respect to round trip fares.

Exam. McGrath: What is the difference in the one-way fare?

The Witness: Three tenths of a cent.

Exam. McGrath: It is three cents per mile intrastate and 3.3 cents interstate one-way?

The Witness: That is correct.

Exam. McGrath: Am I correct in understanding that the railroads didn't ask permission of the Commission to increase that pullman fare ten per cent?

The Witness: The North Carolina Commission actually gave them that permission, Mr. Examiner. I think the trouble is this, we have a three cent statute in the state, and probably they didn't want to press it. It is that difference.

Mr. Clark: I think we should make that clear to the Examiner as to the pullman fares.

Exam. McGrath: That hasn't been made clear heretofore. The impression you left was that the intrastate pullman fares were on parity with the interstate fares, and the North Carolina Commission had authorized the respondents to put the fares on that basis.

Mr. Clark: We have said nothing whatever about pullman fares, Mr. Examiner.

Mr. Gwathmey: For the reason that they are not in-

[fol. 385] volved in this case.

Mr. Clark: Mr. Nicholson will bear us out that there is a state statute limiting your maximum fare to three cents. Am I right about that?

The Witness: Yes, but if we knew you regarded the state statute as highly as you do, we would probably have gotten a statute on 1.65 if we could.

By Mr. Clark:

Q. The fact remains you haven't done that?

A. No.

Q. In comparison with the coach travel within North Carolina the pullman travel within North Carolina intrastate is very, very small; is that not true?

A. Well, you have considerable pullman service within the state.

Q. I didn't say anything about the service. We might be running lots of cars but not having many passengers. Would you mind listening to my question? The intrastate pullman travel; that is, pullman passengers within the state is negligible in comparison with the intrastate coach fares in North Carolina or travelers; is that right?

A. It is not as great. I don't know about the use of the word "negligible."

Q. Give it any words. You can compare it?

A. My estimate would be—I don't know how to give it. I can't give it.

[fol. 386] Q. It is so small you really couldn't put your finger on it?

A. No. I am disturbed by the expression passenger miles, seat miles, something like that.

Q. I used the word 'negligible", because the coach is very large. 'Wouldn't it be fair to say the pullman travel within the state is relatively small?

A. I will say it is, but about the same quantity as steamline coach fare travel in the state, let's put it that way.

Q. That is an unknown quantity. How much do you think that amounts to?

A. It amounts to nothing on some of the lines. You do have a little of it.

Mr. Clark: That is all.

Exam. McGrath: Any further questions? (No response.) You are excused.

(Witness excused.)

B. F. RUSSELL was sworn and testified as follows:

Direct examination.

By Mr. Hillyer:

Q. Will you state your name, address, and occupation?

A. My name is B. F. Russell, Raleigh, North Carolina. I am a traveling salesman. I represent the Travelers Protective Association, North Carolina Division.

Q. Are you chairman of the Transportation Committee [fol. 387] of the Raleigh post of that Association?

A. I am, yes.

Q. How many members approximately has the North Carolina Division of the Travelers Protective Association?

A. More than 3600.

Q. State briefly the object of that Association?

A. Well, the object of the Association is to secure benefits for the members and improvements in services of members of the Association throughout the state as well as insurance benefits that they enjoy.

Q. Have you been authorized to state the position in this proceeding of the North Carolina Division of the Travelers Protective Association with respect to the proposed increase in coach fares from 1.65 to 2.2 cents?

A. I am, yes, sir. The Association is opposed to an increase in fares, especially at this time. We do not feel that the war emergency should be used as an excuse for raising fares, considering the service that is being given. Train service is not as good as it was years ago. We do not feel that we should be made to pay, or rather to be punished for that inferior service that the railroads are furnishing.

Q. Does your company have traveling salesmen who go from points in North Carolina to other points in North Carolina?

A. Yes, sir, we do. We have six salesmen traveling within the State of North Carolina. We are traveling [fol. 388] more by train now and have been in the past year than we have ever traveled before. I know I travel considerably by train compared with what I did a few years ago, and our other men are doing the same thing.

Q. Will you describe from your own observation the condition of the coach travel in North Carolina at the present time?

A. The times I have been on the coaches, cars have always been crowded to standing room. In August I made a trip from Raleigh to Greenville, South Carolina. The service was very good from Raleigh to Greensboro, but from Greensboro to Greenville, South Carolina, the coach was bad. The screens were out. It was a very unsatisfactory ride. I came back by Asheville, and left Black Mountain on 22 after the agent had failed to make reservation for me, saying it was not necessary in the pullman car, and I was not able to get a seat in the pullman car, because the pullman car conductor told me it was sold out every day leaving Asheville. I was in a coach that was crowded to standing room. The heat was terrific in there. If the windows were open, of course, cinders and dust were bad. You just had to take it one way or the other. I did finally get in the pullman car at Barbour Junction.

Q. Are your trips mostly intrastate or interstate?

A. Most of it was in the state.

Q. Would this increase from 1.65 to 2.2 cents mean anything in dollars and cents to your company?

[fol. 389] A. It would, yes, sir. It would cost us more money for the traveling of the men.

Q. The name of your company is E. F. Craven Company?

A. Yes, sir.

Q. What do they deal in?

A. Heavy construction equipment.

Q. In your journeys in North Carolina, have you ever been able to use the st-eamline coach?

A. No. The only place that we would be able to use the streamlined coach or trains would be between Greensboro and Charlotte, and the schedules that they pass those two points on would not be very much service to us except in case of an emergency.

Q. Have you had any previous railroad experience, Mr. Russell?

A. Yes, sir, I have. I was fireman on the Southern Railroad out of Atlanta, Georgia, for a little more than three years and operated a locomotive as locomotive engineer for about the same period of time. I resigned, I will say, with clear record January 1, 1913. I was called back into the service during the last World War and ran a locomotive down there on the same division for about—oh, I don't know, fifteen or seventeen months.

Q. As a result of that railroad experience, what is your attitude towards the railroads?

A. I have a most kindly feeling for the Southern Railroad [fol. 390] in particular because I worked for it a long time. I can't help but say that. I have a kindly feeling for all the railroads. If I go to saying something I shouldn't, you can call me off. I believe that certainly three or four of the main railroads represented here are good customers of mine, so what I am saying about wanting no fares increased is a matter of business with us. We do not think sincerely—I am speaking for myself, my company, and the T.P.A., expense of a traveling man is a serious item with the traveling man. We do not feel and do not believe that fares should be increased certainly at this time.

Q. Is your objection primarily based upon the poor quality of service for intrastate travelers?

A. Yes, sir.

Mr. Hillyer: That is all.

Cross-examination.

By Mr. Clark:

Q. What was the name of your company?

A. E. F. Craven Company, Greensboro.

Q. Headquarters at Greensboro?

A. Yes, sir.

Q. What is their line of business?

A. Heavy construction equipment, contractor's equipment.

Q. Road building?

A. Yes, trucks, bull dozers, things of that kind.

Q. Tractors, concrete mixers, and all that?

[fol. 391] A. Yes, sir.

Q. How many men do you say you travel?

A. Six.

Q. Within the state?

A. Within the state.

Q. Do they make any interstate journeys?

A. Very seldom, that is on business.

Q. Do you mean to say your operation at Greensboro is confined solely to the State of North Carolina?

A. Yes, sir.

Q. You just work within the State?

A. We represent some forty or fifty factories, manufacturers of equipment within the State of North Carolina.

Q. There are men traveling, I take it, engaged in the same general line of business in surrounding states, are there not?

A. Yes.

Q. And you are all working in competition, one with the other and making a good record of sales?

A. No.

Q. I don't understand. Don't you work in competition one with the other?

A. No; they don't come in North Carolina.

Q. You seggregate the business?

A. Yes, sir.

[fol. 392] Q. You stick to North Carolina, and they stick to South Carolina and Virginia?

A. Yes, sir.

Q. That isn't true generally of the business, is it?

A. Well, a lot of factories assign territory to a distributor and he works that specified territory.

Q. So far as distributing to a territory is concerned, we all recognize that, but all business is not done on that basis, is it?

A. Probably not all of it, no.

Q. The better part of it is not done that way?

A. I wouldn't know.

Q. You spoke of 3600 members of your TPA post. Was that in the State of North Carolina?

A. Yes.

Q. They are engaged in various and sundry activities, are they not?

A. Traveling men and business men.

Q. They are engaged in various and sundry business activity?

A. Yes, sir.

Q. Those men do not confine their travel to the State of North Carolina, do they?

A. Well, not all of it, no.

Q. Don't they make interstate journeys just as readily as they do intrastate?

[fol. 393] A. Some of them do.

Q. Many of them?

A. Perhaps.

Q. Wouldn't you say a great majority of them do?

A. I wouldn't say that.

Q. In other words, most of them are in North Carolina?

A. I think so.

Mr. Clark: That is all.

Redirect examination.

By Mr. Hillyer:

Q. Mr. Russell, did you ever go from one point to another in North Carolina and get off the train and buy a ticket in order to defeat the through interstate rate?

A. No.

Mr. Hillyer: That is all.

(Witness excused.)

Exam. McGrath: We will take a brief recess.

(A short recess was taken.)

Exam. McGrath: The hearing will resume.

J. C. Bowman was sworn and testified as follows:

Direct examination.

By Mr. Hillyer:

Q. Will you please state your name, address, and occupation?

A. My name is J. C. Bowman. I am inspector for the Utilities Commission. I have been with them about six years, a little more than six years. My home is at Marion, [fol. 394] North Carolina.

Q. Has the North Carolina Commission asked you to make some actual field investigations and inspections of coach fare travel in North Carolina today?

A. Yes, sir.

Q. Did you make original records and notations at the time of your inspection?

A. Yes, sir.

Q. Have you prepared some of your reports in the form of a stencil?

A. Yes, sir.

Q. To be introduced as an exhibit here?

A. Yes, sir.

Mr. Hillyer: We ask to have marked for identification No. 18, consisting of four sheets, the report of Mr. Bowman.

Exam. McGrath: All right.

(Protestant's Exhibit No. 18, witness Bowman, marked for identification.)

Mr. Hillyer: Mr. Examiner, in view of the fact that these reports are set out in detail, we have prepared the report in this form to save the record.

By Mr. Hillyer:

Q. Now, Mr. Bowman, have you any further explanation to make of these reports?

A. Well, no, sir. These reports cover just about what happened at these different places. Of course, now I have some information that wasn't made up in a report.

[fol. 395] Q. Are the facts set out in these reports true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Mr. Hillyer: We ask that Exhibit 18 be received in evidence.

Exam. McGrath: The exhibit is received.

(Protestant's Exhibit No. 18, witness Bowman, received in evidence.)

By Mr. Hillyer:

Q. Captain Bowman, what is the general condition of the coaches in North Carolina today in relation to number of passengers in the coaches?

A. Well, I think the coaches are in bad condition, the number of passengers that are being hauled.

Q. My question related to the number of passengers per coach.

A. Well, the coaches are so much overcrowded that it is hard to get a seat. I find them that way.

Q. Do you find people standing in the aisles who are unable to get a seat?

A. Yes, sir.

Q. Have you any recent instance in mind?

A. Well, I have one trip from New Bern to Marion, North Carolina, that was made one day last week. I boarded the train at New Bern around 5:30 p. m., and I came up to Goldsboro and changed there. I changed to the Southern, and I was unable to purchase a ticket on the [fol. 396] Southern line up here, because they were crowding in the ticket agent, so I got on the train and told the conductor I wanted to buy a ticket to Marion, and that I would like to have a pullman ticket, so he told me that he would sell me a ticket to Raleigh, and I might get off here and perhaps I could purchase a pullman ticket all the way through to Marion. I got off and bought my ticket to Marion, but I was unable to get a pullman ticket. We boarded the train, I guess it was right around 9:30, we were a little late getting out, and we went to Greensboro. It was very much overcrowded, and we got off at Greensboro at 1:40 and was told by the porter inside that the train going to Marion would be an hour late, something like 2:40 before it would come in. We actually waited until a little after three, a little more than two hours. I think we waited there around two hours, so when they called out the train there, I tried to get back on the train. They were very much crowded and jammed in. I got kind of at the rear end of the crowd and the coach was filled to capacity and the steps and everything. Five or six of us were left out, and finally some trainmen noticed us there and took us to another coach and crowded us in two or three coaches ahead, and we rode that way. The aisle was jammed, people sitting even between seats where they had the backs together. They had crawled under there and were sitting on the floor, and I feel safe in saying—I wasn't able to move around to [fol. 397] count people—I think there must have been a double capacity load there, because there were as many people standing as were seated, and that condition was pretty well all the way on up to Salisbury, and I had to change trains again at Salisbury, and I found the train

more or less crowded all the way, especially from Raleigh to Marion.

Q. How many times did you have to change cars?

A. I changed cars—from New Bern to Marion, I changed cars three times.

Q. What is the distance by that route?

A. The distance is approximately 250 miles, I don't know. It is about that.

Q. How long did it take you to make the trip?

A. It took me fifteen hours and a half. We had long delays, stopping here and there.

Q. Do these North Carolina trains go through to the main towns, or do they stop at local stations?

A. They stop at local stations.

Q. Have any branch locals been taken off and out of service in North Carolina?

A. Well, it is my impression that there has. Personally I haven't made any investigation. The report to the Commission indicates that they have.

Q. Do the conductors have any difficulty in getting through these crowded trains?

[fol. 398] A. I heard the conductor remark in coming back on the train that it was so crowded, I heard him make the remark that, "This is my last time trying to get through the coaches. I don't care if I don't get all the tickets, I can't make it."

Q. Have you been able to get on streamlined trains for journeys within North Carolina?

A. No, sir. I have made one or two efforts, but I have not been able to buy a ticket.

Q. What was the reason?

A. Well, on one occasion I went to the depot, the Seaboard station over here in town, and I asked for a ticket to Hamlet, North Carolina, to be used on either the 12:05 or 1:05 schedule and was told by the ticket agent he couldn't sell me a ticket to be used on either of those trains for that destination, and that the nearest point in that direction to which she could sell me a ticket would be to Columbia, South Carolina.

Q. Have you found any instances where the conditions of travel resulted in passengers getting off the train?

A. I don't understand.

Exam. McGrath: Read the question.

(Question read by the reporter.)

The Witness: On one occasion on a trip from Washington, North Carolina, to Aurora, I would like to give the whole story of that if it is all right, I went to Washington about 9 p. m.—9 a. m., I mean.

[fol. 399] Exam. McGrath: Is that the story that is related in your exhibit on page 4?

The Witness: Yes:

Exam. McGrath: It isn't necessary to repeat that.

The Witness: On this occasion we had one other passenger with me going down to Aurora. He stated he was unable to take it any longer, and he believed he would get off and see if he could get some other way of going in to his destination.

Mr. Hillyer: That is all.

Cross-examination.

By Mr. Clark:

Q. Have you traveled anywhere within recent months other than within the State of North Carolina?

A. No, sir.

Q. You have been nowhere but within the state?

A. Within the state.

Q. You don't know what is going on outside the state?

A. I wouldn't say.

Q. You recognize, of course, the streamline passenger trains you refer to have the reserved seats and when they are sold, they are sold, and there is just no more?

A. That is true.

Q. That is similarly true with respect to pullman?

A. That is true.

Q. It is only in what we refer to as the coach travel that you have to come in and first come, first served, is that right?

[fol. 400] A. That is true.

Mr. Clark: That is all.

By Mr. Gwathmey:

Q. Captain, I want to ask you if you will be good enough to look at this Atlantic Coast Line Railroad folder which

I hand you and point out the location of the line operating between Washington and Aurora—Washington, North Carolina.

A. It runs down to Vandemeer.

Q. It is a little stub line that extends from Washington down to Vandemeer and Aurora; that is in there between those points?

A. That is true.

Q. Will you tell me how you happened to make a trip over that line?

A. Well, I was instructed to by the Commission.

Q. You were told to go over there and ride it?

A. Yes, sir.

Q. That is over on the coast. You can look at it if you care to, Mr. Examiner, on this map, and see for yourself the location of the line. If you look at the Coast Line time table, you find, do you not, that there is only one train operated between Washington and Vandemeer, passing through Aurora?

A. That is true.

Q. One train a day?

A. Yes.

[fol. 401] Q. Is that a mixed train?

A. Yes, sir.

Q. Did you say how many passengers were in that coach besides yourself on that trip?

A. There was only one, and he left, so there was nobody besides myself.

Q. You had it by yourself?

A. Yes, sir.

Mr. Gwathmey: Any further questions?

Mr. Hillyer: No.

(Witness excused.)

C. B. Wade was sworn and testified as follows:

Direct examination.

By Mr. Hillyer:

Q. Will you state your name, address, and occupation, please?

A. C. D. Wade, inspector, North Carolina Utilities Commission, Morehead City, North Carolina.

Q. In the course of your duties, has the North Carolina Commission asked you to make certain inspections of coach travel facilities and conditions in North Carolina?

A. They did.

Q. Have you made notes and original records at the time of these inspections?

A. I did.

[fol. 402] Mr. Hillyer: We ask to have marked for identification Exhibit No. 19, consisting of one sheet.

Exam. McGrath: Very well.

(Protestant's Exhibit No. 19, witness Wade, marked for identification.)

By Mr. Hillyer:

Q. Mr. Wade, are the facts stated in Exhibit No. 19 true and correct to the best of your knowledge and belief?

A. They are.

Mr. Hillyer: We offer in evidence Exhibit No. 19.

Exam. McGrath: The exhibit is received.

(Protestant's Exhibit No. 19, witness Wade, received in evidence.)

By Mr. Hillyer:

Q. Mr. Wade, what generally is the type of equipment which is used for coach travel in North Carolina today?

A. I don't know whether I understand you there. Do you mean this particular train or generaly speaking?

Q. I mean generally.

A. It is an inferior type of equipment.

Q. Would you say that it is modern or antiquated or how would you describe it?

A. This particular train I rode, that was antiquated.

Q. Did you notice anything unusual about the conductor in taking up the tickets on this train?

[fol. 403] A. Yes. On this particular trip, we left Fayetteville five minutes after eight, and we were five minutes late leaving. The conductor was checking his fares, his tickets, and had to lean over the window to get light from

the outside rather than from the lamp on the inside of the coach, in order to read what was on the ticket.

Q. Where did that light come from?

A. A kerosene lamp on the coach.

Q. What light did he use to read the ticket?

A. Daylight.

Q. How does that equipment compare with the equipment used on the through train, the through interstate trains?

A. Why, of course, the through interstate trains appear to be the later type of passenger equipment, and this appears to be the oldest type, most antiquated.

Q. In your Exhibit 19, you state that 75 or 80 per cent of the passengers on that train from Fayetteville to Wilmington were local. What do you base that estimate on?

A. On the few persons on the train when we started the trip at Fayetteville, and the few who got on and off at the different stations on the line. At some stations there were ten or fifteen to get on or off, leaving Wilmington, we had thirty-seven on, and when we arrived at Fayetteville, we only had twelve on the coach. Of course, the greater majority of travel is local on and off different stations, Fayetteville being a shopping center and Wilmington being a [fol. 404] shopping center, they use that train for that purpose, I think.

Q. What is the best part of this coach travel in North Carolina today, Mr. Wade?

A. When you get to your destination, I think, when you get off.

Mr. Hillyer: That is all.

Cross-examination.

By Mr. Gwathmey:

Q. Mr. Wade, you are pretty familiar with the location of the Atlantic Coast Line Railroad lines in North Carolina?

A. I think so, yes, sir.

Q. You know that from Wilmington the line extends northward to Wilson, Rocky Mount, where it connects with the main north and southbound line, and then you have another line extending from Wilmington over to Florence where it also connects with the main north and southbound line; that is true, isn't it? This line that you rode over

from Wilmington up to Fayetteville is the short line in here directly to the nearest junction with the main line, isn't it?

A. That is right.

Q. And at Fayetteville passengers can leave or get on *of* the main north and southbound trains of the Coast Line, isn't that true?

A. That is true.

[fol. 405] Q. This train that you rode was a mixed train, wasn't it?

A. Yes, sir.

Q. Can you tell me how long that train has been in operation?

A. I can. I think two or three weeks.

Q. Wasn't it put into operation by authority of the North Carolina Commission?

A. It was.

Q. You say you assume that eighty per cent of these passengers were local passengers. Isn't it a reasonable assumption that some of those passengers were either going to Fayetteville to take a northbound through train or a southbound through train or gotten off at Fayetteville from one of the through trains and were going over to Wilmington?

A. That could have been true, but when we left Fayetteville, we had only nine passengers and we arrived at Wilmington with forty-seven.

Q. Some of those passengers might have come from Washington, D. C., or New York or Jacksonville, Florida?

A. That is true. I don't think there were more than a half dozen servicemen on that train that day.

Mr. Gwathmey: That is all.

By Mr. Clark:

Q. Mr. Wade, the inferior coach service that you referred to in answer to Mr. Hillyer's question, I take it there you had in mind just such train situations that you have been discussing recently with Mr. Gwathmey, not the main [fol. 406] body of trains in North Carolina?

A. Certainly not.

Q. Is that right?

A. That is right.

Q. Have you been out of the state within the past year or have you been confined entirely to the State of North Carolina?

A. I don't think I have been within a year.

Mr. Clark: That is all.

Exam. McGrath: Any questions on redirect?

Mr. Hillyer: No.

Exam. McGrath: You are excused.

(Witness excused.)

DORIS S. WHITNACK was sworn and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name and office address, please?

A. My name is Doris S. Whitnack, office address, Federal Office Building No. 1, 2nd and D Streets, S. W. Washington, D. C.

Q. Will you state the nature of your employment or your occupation, and with whom you are employed?

A. I am employed by the Office of Price Administration branch as an economist and have been so employed for the last two and a half years.

[fol. 407] Q. Will you describe very briefly your education and experience in connection with transportation matters?

A. I graduated from Radcliff College with an A. B. in economics and subsequent to that time, have done post graduate work principally in transportation and finance. I have been employed by the National Resources Planning Board, first as construction economist, and then subsequent to that time, on their transportation study. After that time, I joined the staff of the Office of Price Administration and have been there for the last two and a half years.

Q. Were you instructed to prepare some exhibits in connection with this case?

A. Yes, I was.

Mr. Miller: Mr. Examiner, I ask that this exhibit which consists of eight memeographed pages be marked for identification as No. 20.

Exam. McGrath: Very well.

(Protestant's Exhibit No. 20, witness Whitnack, marked for identification.)

By Mr. Miller:

Q. Mrs. Whitnack, do these pages of the exhibit concern the same carriers throughout?

A. Yes, they do in all instances except that the last exhibit, or last page of the exhibit, refers to all the carriers in Southern Region.

[fol. 408] Q. What was the basis for the selection of these particular carriers?

A. These carriers were selected on the basis of the list shown on Page 15 of the petition of the carriers to the Interstate Commerce Commission.

Q. In this proceeding?

A. In this proceeding, yes.

Q. Will you proceed through the exhibit, assigning page number and sequence and describe briefly and generally the data there on each page?

A. Page 1 shows the net railway operating income before Federal income taxes for the seven Class 1 roads operating in North Carolina. I think the exhibit speaks for itself, and I want to point out the tremendous increase in this net railway operating income before income taxes for twelve months ended October 30, 1943, as compared with the twelve months for the year 1941. The increase amounted to approximately $205,000,000 or 130.3 per cent.

Page 2 shows the freight and passenger revenues of the same seven railroads for the years 1936 to 1943, and I think that clearly speaks for itself.

Page 3 is merely a statement of the passenger service, net railway operating income for the years 1936 to 1942 as reported by the carriers in their annual reports to the Interstate Commerce Commission. In connection with this page, it should be indicated that the dollar figures are in [fol. 409] thousands. We neglected to put that on, but that is the case.

Q. What is the meaning of that small "d" in the exhibit?

A. Well, as indicated in the bottom below the source, "d" indicates the deficit.

Page 4 is a statement of the freight and passenger service operating ratios for the years 1936 and to 1942 as reported by the carriers, and January and September, 1943.

as estimated by our office. The method for estimating the 1943 operating ratios is explained on Page 5 of the exhibit, which is explained on Page 5 for passenger service and all expenses not allocated to passenger service according to this method were allocated to freight, and the same thing is true of revenues, so that the freight revenues were derived more or less by residual method.

I would like to point out that there was a tremendous drop in 1942 in the passenger service operating ratio, a drop of approximately forty points, and according to our estimate, the operating ratio for the passenger service in 1943 would be 52.3 per cent, which is slightly below the operating ratio for the freight service on these seven roads.

The accuracy of the estimate is, I think, indicated by the statement on Page 5 regarding the coefficient of correlation. It was 94 per cent and standard error of estimate was .85 per cent.

[fol. 410] Q. Do I understand that you made an actual test of the formula as against figures reported by the carriers to the Interstate Commerce Commission?

A. Yes; that is true. This coefficient of correlation and your standard error is based on data in previous years. That measures the degree of relationship and accuracy of your estimate.

Q. Can you explain in more common language approximately what that probable error would be?

A. Well, if the relationship between the factors which we are correlating were absolutely perfect, we would have a coefficient of correlation of a hundred per cent, so you can see that 94 per cent indicates there is a close relationship. Having established that this relationship is close, based on previous years data, we can find math-matically that measuring this relationship and obtaining a math-matical equasion for the relationship, the standard error is .85 per cent, which means that by your equasion, if you took .85 per cent on either plus or minus on either side of your estimated value, you would have sixty-five chances out of a hundred to be correct, and if you double that standard error, you would have ninety-five chances out of a hundred of being right. Since it is so small, it indicates that your chance of being wrong. When you estimate from your equation, your regression equation is very slight.

[fol. 411] Page 6 is a statement of rate of return judged on various investment bases, and since these typing signs are not very clear, I would like to read what columns 10, 11, and 12 are. Column 10 is the net railway operating income before Federal income taxes for the twelve months ended October 31, 1943, divided by the sum of investments in railway property used in transportation service shown in column 2 plus cash and materials and supplies as shown in column 5.

Column 11 is the net railway operating income before Federal income taxes for twelve months to October 31, 1943, minus rents for leased road and equipment which we have assumed is the same for the twelve months ended October, 1943, as for the year 1942, since we have no way of obtaining it by months. That figure divided by the net book investment plus cash and materials and supplies are shown in column 6.

Q. Will you explain what that term "Net Book Investment" means?

A. Net book investment means or is the book investment in transportation property shown on Accounts 701, 702, and 702½, minus accrued depreciation and accrued amortization of defense projects.

Column 12 is net railway operating income before the Federal income taxes divided by net book investment plus cash and materials and supplies.

In connection with this page, No. 6, I would like you [fol. 412] to consider the figures shown on Page 8, which show how these methods of judging return would have compared with the Commission's return in valuation in the year 1937, which is the last year for which we have any data on the rate of return as approved by the Commission. I would like to point out that the valuation or the net book investment, not valuation but net book investment plus cash, materials, and supplies, as of 12-31-36, was 93.1 per cent of the final value determined by the Commission for the Class 1 line haul railways in the Southern Region whereas the investment railway property used in transportation service plus cash, materials, and supplies as of the end of 1936 was 130.1 per cent of the Commission's valuation.

The rate of return before Federal income taxes on these various bases and by the method again is shown at the bottom of the exhibit.

Q. Page 7 contains notations as to the source of the figures on Page 6; is that correct?

A. Yes. Page 7 is only a statement of sources.

Q. Will you explain briefly the difference between the figures on columns 2 and 3 of page 6?

A. The principal difference is that column 2 includes property leased by the railroad but not owned by it and does not include property owned but not used.

Q. And what is column three?

[fol. 413] A. Column 3 is the investment of the carrier in transportation property. That also includes improvements on leased property.

Q. What is the number of the account in reports to the Commission upon which column 2 is based?

A. It is not an account number. Column 2 comes from Schedule 211-N in the annual reports.

Q. Would Column 3 include investments made from surplus?

A. Yes, column 3 would include investment regardless of the source of the money to pay for the property.

Mr. Miller: That is all I have on direct, Mr. Examiner. I offer the exhibit in evidence.

Exam. McGrath: Exhibit 20 is received in evidence.

(Protesant's Exhibit No. 20, witness Whitnack, received in evidence.)

By Mr. Hillyer:

Q. Referring to Page 3 of your Exhibit 20, in 1942 we note that the Clinchfield in spite of the generally improved financial condition of the carriers have suffered a deficit from passenger operations?

A. Yes; that is true.

Q. And that same is true of the Norfolk Southern?

A. Yes.

Q. If those showings were taken alone, they would indicate clearly, would they not, that there is a need of additional revenue for passenger service from those two particular lines?

[fol. 414] A. Yes. This does indicate that passenger service is unprofitable on those two railroads.

Q. Then passing to Page 6, we find under columns 11 and 12 that the Clinchfield, for example, is earning a very high rate of return from its entire operations; is that right?

A. Yes, upon its book investment, net book investment.

Q. And that the Norfolk Southern to a less degree is earning in excess of 5.75 per cent return?

A. Yes. I think all of these roads here show a higher rate of return regardless of the basis upon which it is figured.

Q. What would your suggestion be to the North Carolina Commission with respect to those two showings? Would you care to state whether you think that Clinchfield and Norfolk Southern should be entitled to an increase in coach fares or not entitled because of their overall picture where they earn in excess of 5.75 per cent return? If you don't care to answer that, I will be glad to ignore it.

Mr. Hillyer: Maybe I should address this to Mr. Miller. I wonder what the position of the OPA would be in that situation, Mr. Miller, if you care to tell us.

Mr. Clark: Aren't we dealing with facts and not positions of the OPA. We don't care what their position would be. We are interested in the fact.

Exam. McGrath: They will be permitted to state their position on brief.

[fol. 415] Mr. Miller: I will be glad to give it.

Mr. Hillyer: We are drawing out some facts from this exhibit that it is my understanding that the OPA is opposing increases in coach fares even to those two lines due to the fact that they are earning more than 5.75 per cent on return on investment. Is that correct?

Mr. Clark: They have asked for the very thing that the Examiner ruled was appropriate for briefs, to argue, not facts.

Mr. Hillyer: That is a statement of position, not argument.

Mr. Clark: When a party appears and puts in facts, then you argue the position from those facts.

By Mr. Miller:

Q. Do these exhibits show an overall need for additional revenues by any of the carriers there listed?

A. I think they show quite clearly that the carriers listed do not need additional revenues.

Exam. McGrath: What carriers did you use in making up Page 8 of your exhibit?

The Witness: Page 8?

Exam. McGrath: I know you describe them generally as Class 1 lines in Southern Region. Did you take that from some publication?

The Witness: Class 1 railways, excluding switching and terminal companies as assigned to Southern Region for [fol. 416] the year 1937 by the Interstate Commerce Commission, Bureau of Statistics.

Exam. McGrath: In the fifteen per cent case, you mean?

The Witness: It is a statistical classification which is definite. I couldn't give you right at the moment the list of goods.

Exam. McGrath: You rely upon that publication, Statistics of Railways?

The Witness: Statistics of Railways in the United States for the year 1937.

Exam. McGrath: Any further questions?

Mr. Clark: Yes.

Cross-examination.

By Mr. Clark:

Q. I would like to ask, Mrs. Whitnack, if you ever had occasion to operate a railroad.

A. No, indeed.

Q. Your entire experience since you came from your scholastic and university studies has been as economist with the Government?

A. With the Government, yes.

Q. You know nothing whatever about the financial needs of railroads when it comes to running a railroad?

A. I have never run a railroad, I will say that.

Q. Do you agree with me there is no substitute for experience?

A. Well, I don't——

[fol. 417] Q. Leaving out coefficiency of the efficiency.

A. I don't think you necessarily have to run a railroad to be able to draw some conclusions from its figures as reported if you go clearly into what those figures indicate.

Q. Some conclusions, I would agree with you on that. You made a very definite statement in answer to your counsel's question. I was compelled to ask you if — ever had any experience either with running a railroad or financing it.

Mr. Miller: I think that question is based upon what is shown by the exhibits and not what experience she has had running a railroad.

By Mr. Clark:

Q. I asked if you had had any experience either physically running a railroad, operating or arranging the financing of one?

A. I think I answered that question that I never have had.

Q. The answer is no?

A. The answer is no.

Mr. Clark: That is all.

(Witness excused.)

Mr. Miller: That is all we have. The O. P. A. rests.

Mr. Hillyer: The State of North Carolina and Charlotte Shippers Association and T. P. A. will rest.

Exam. McGrath: Is there any testimony in rebuttal?

Mr. Clark: Yes, sir. I would like to call Mr. Barry back to the stand.

[fol. 418] E. E. Barry testified further as follows:

Redirect examination.

By Mr. Clark:

Q. You have been previously sworn in this proceeding?

A. Yes, sir.

Q. You have heard some testimony here today, I take it, with respect to coach travel, crowded conditions, and we will say the unsightly conditions of the cars. You have heard that testimony by these witnesses?

A. Yes, sir.

Q. I want to ask you whether you have had occasion to travel on trains in North Carolina and in other states and interstate within the past year.

A. Yes. My duties require more or less travel which involves not only the line of the Southern Railway, but the Southern States, and in other territories, Chicago, New York.

Q. In the course of your travels, have you had occasion to travel in both the pullman and coach service, and if you were traveling in pullman service, did you have occasion to observe the coach situation?

A. Yes. I always make it a practice when I get on a train, if I am riding on a sleeping car, to walk through that train a number of times just for observation. I find a number of things of interest.

[fol. 419] Q. At stations where you are waiting to board the train or stations where you debark, do you have opportunity to observe crowds traveling and particularly those in coach travel?

A. We do.

Q. I want to ask you to tell us whether or not you have noted any special distinction worthy of note in those conditions in North Carolina and general in your travel interstate and adjoining states so far as coach travel in concerned.

A. The conditions obtaining in North Carolina are no different from conditions pertaining in other states, and the crowded conditions of trains is general.

Q. Let's come to the question of cleaning of cars in these crowded conditions. Do the crowds have any bearing upon that?

A. The crowds create that condition to a very large extent.

Q. Does the fact that you have a crowded coach tend to facilitate or to impede the cleaning up of banana peelings and other similar things?

A. It impedes it very much, because the great majority of passengers get on the train with newspapers, magazines, or fruit, candies, and naturally they just throw that on the floor when they have finished it. Now, the crowded condition of the coach makes it impractical to attempt to clean that car up, sweep out that car while en route.

Q. Your porters could not get through for the crowds?

A. As a matter of fact, a lot of people kind of resent him.

[fol. 420] Q. If your porter is sent through by the conductor to brush up this debris, I will call it, does that meet with the approval or opposition of passengers?

A. It meets with the opposition. Conditions are such that they don't want to be moving around to make way for him to get through.

Q. Let's take the case of these coaches today on your trains. Have you more coaches than you normally have had in times past?

A. The coach equipment on all trains has been increased. As a matter of fact, on the Southern Railway every coach that is available is now in regular service, and the number of cars now operating run from, say, three to eight where formerly it was from one to four.

Q. Let's take the case of the demand for your coaches. When you get to a terminal point, you have to take that train to the yards and turn it and make an effort to recondition it for the next trip; is any pressure put on you by the immediate demand again for those coaches in service?

A. That is true, and in many cases, the turnaround time is very limited.

Q. Does that permit as thorough cleaning out as you might have in times past performed?

A. It does not—in fact, a lot of instances where normal procedure would be to take coach equipment to the [fol. 421] yards for thorough cleaning on account of late arrivals and the necessity of turning them around on outbound trains, they have to make that cleaning job as best they can right there in the station.

Q. Without ever taking it to the coach yard?

A. Yes, sir.

Q. You have heard of the Pennsylvania Railroad referred to as the Standard Railroad of the World?

A. Yes, sir.

Q. They are rather proud of that?

A. Yes, sir.

Q. Have you had occasion to travel on its trains in coach service?

A. Quite frequently, yes.

Q. Have you found it is faring any better or any worse? How does it compare with the coach travel and facilities of the Southern Railway which you generally describe?

A. The conditions in coach service on the Pennsylvania

between New York and Washington, Washington and Chicago, are certainly no better than it is on our line.

Q. About the same situation?

A. Yes, sir.

Q. You have dealt, of course, largely in your discussions with the comparisons of Southern Railway operations within North Carolina and interstate. Have you had occasion to ride on any of the other North Carolina lines re-
[fol. 422] cently as to say what their situation is?

A. Yes; Norfolk Western, Seaboard, and I believe that is the extent of North Carolina.

Mr. Clark: That is all.

The Witness: I might mention, Mr. Clark, that this congested condition on trains reached the point that it is not infrequent now for a train to pull into a station and cannot take aboard all passengers offered.

By Mr. Clark:

Q. Something was referred to in the testimony about not being able to get space on the streamliners. The streamliners are generally known as the coach trains on which there are reserved seats?

A. Assigned seats, yes.

Q. If a person buys a seat, he is entitled to that seat, and he expects to have it?

A. Yes, sir.

Q. When you have sold out to capacity, the seat capacity, of the train, do you sell any more tickets on that train?

A. No, sir.

Q. It would be quite an embarrassment to have people standing up and sitting down on a fellow's seat the minute he got out?

A. We do not do that. In the City of Washington, there is not a day of the Southern leaving there that we do not have to deny some passengers seat space on that train.

Q. With respect to the normal coach fare with the seats
[fol. 423] not reserved, they keep piling on as long as they can get a foothold?

A. That is correct.

Q. That accounts for a great deal of these statements that the witness said he could not get on a streamlined train?

A. Yes. I might mention that that condition applies very similar to pullman equipment, that the passengers in pullman cars are occupying space to capacity.

Q. We have only recently had a little difficulty in getting down here and still don't know how to get home; isn't that right?

A. I don't know how. We will probably ride the coach and stand up.

Mr. Clark: That is all.

Exam. McGrath: You may cross-examine the witness.

Mr. Miller: No questions.

Mr. Hillyer: No questions.

(Witness excused.)

T. G. Hanes testified further as follows:

Redirect examination.

By Mr. Clark:

Q. Mr. Hanes, you have been previously sworn in this case?

A. Yes, sir.

Q. Did you hear Mr. Barry's testimony about the con- [fol. 424] ditions in coach travel being generally similar on other roads interstate as well as North Carolina?

A. Yes, sir.

Q. Without going into detail, may I ask the general question, Mr. Examiner, if he has anything more to add, or if he agrees to this testimony?

A. I agree with it as to the Southern Railway. I have not been on the Pennsylvania. My only experience within this year on other roads has been on the R F & P, and A C L and F E C in Florida.

Q. I believe just no later than last week you had quite an experience on R F & P. I want you to tell us about that.

A. It started at Fayetteville on the A C L. That was on the Sunday afteroon of the 12th of December.

Q. It was a crowded condition?

A. Very, very crowded condition. We left Fayetteville with plenty of room. At Wilson we picked up a bunch of servicemen. At Rocky Mount we got extra cars and more

servicemen. We went through Richmond about as is. We got to Fredricksburg and picked up a bunch of college girls and went on over to Quantico and put on just as many people as could get into it.

Q. When you hit Washington, your coaches were full?

A. The porter or no one else could have gotten through that car after it left Quantico.

[fol. 425] Mr. Clark: That is all.

Exam. McGrath: Any questions on cross?

Mr. Miller: No.

Mr. Hillyer: No.

(Witness excused.)

J. S. Tassin testified further as follows:

Redirect examination.

By Mr. Clark:

Q. Are you the same Mr. Tassin that has been sworn?

A. Yes, sir.

Q. Did you have a copy of Mrs. Whitnack's Exhibit No. 20?

A. Yes, sir.

Q. In connection with that, she testified to an item of $2,240,000,000 as the Commission's valuation or something of that kind. Did you remember her statement?

A. Yes.

Q. I wish you would please explain for the record about that figure?

A. Yes, sir. First let me say my valuation experience goes back to 1914, and my experience in my present position goes back to 1932. This 1937 figure is, therefore, familiar to me from both standpoints.

Q. Let me interrupt you there, you were auditor of valuation on the Southern Railway.

[fol. 426] A. From 1920 to 1932.

Q. Prior to being designated general statistician?

A. Yes, and on valuation work as far back as 1914.

Q. Go ahead.

A. At this period, of course, the Commission reports are going to speak for themselves—at this period in 1937,

the railroads were seeking increases, because they were in such a desperate situation that they needed revenues and had to get them as quickly as possible and on any basis anybody could conceive, they needed money, so the issue of valuation so-called was purely academic. Even at that, these Commission figures were not put forward as compliance with the requirements in 19-A but as bases for comparison for uses in those particular cases.

Q. In a word, these figures are not the result of a valuation proceeding under Section 19-A?

A. That is right.

Q. Anything more?

A. Yes. This was in 1937. We are now in 1943 when conditions are vastly different when the essential nature of railroad service is fully recognized and to say today that that essential service is not worth what it cost to produce just does not make sense to me.

Q. One more explanation, Mr. Clark, I think will be helpful on the preceding page.

[fol. 427] A. Where these rates of return are produced before deduction for Federal income taxes, where you look as if you have got quite substantial rates of return—well, you have to have those rates of return if you are going to pay those taxes, and you have to pay the taxes, so whether you are going to allow for Federal taxes before or after is purely academic, because you have to pay those taxes in any event and pay out of current income.

Q. Most of us have to pay Federal income taxes?

A. Yes, sir.

Q. We have got to pay it, and it comes out of earnings?

A. Yes, sir.

Q. And what we have to live on as it were is after we have paid tax to the Government?

A. Yes.

Q. Is that a similar situation?

A. Similar situation.

Q. Does it make any difference if you want to camouflage by calling excess profit tax or anything else?

A. It does not. The resulting comparison must recognize the necessity for paying these taxes.

Q. I will put it this way, if I made $20,000 a year and had to pay $15,000 to the Federal Government under some kind of tax schedule, I wouldn't be making but $5,000?

A. You wouldn't.

[fol. 428] Mr. Clark: That is all.

Recross-examination.

By Mr. Miller:

Q. Mr. Tassin, I believe you just stated that the charge for the present services should be based upon present cost; is that correct?

A. No. That isn't the statement I made. The statement I made is that service being essential, it could not possibly be worth less than it cost to provide.

Q. Do you put my figures in this record to show exactly what it cost to provide this coach service?

A. Cost of coach service?

Q. Yes.

A. No.

Q. Is there any particular reason for that?

A. Yes, wholly unnecessary, because it is common to both inter and intrastate, and immaterial in this case.

Q. I notice even in your own exhibits that you show quite a favorable operating ratio for 1942. Doesn't that indicate you are earning more than your expenses for the coach service?

A. No. You haven't got an operating ratio related solely to coach service.

Q. Change it from coach service to passenger service, it shows in general.

A. Yes. It shows that there was a greater volume of [fol. 429] passengers service.

Q. In other words, at the present time passenger service is costing less than the amount it earns?

A. At the present time, yes, in 1942.

Q. And 1943?

A. We may have to revise that statement when we know what added labor bill we are going to have to pay in 1942 and 1943.

Q. Was that situation prior to the war?

A. No. We were spending more than a dollar in passenger service to earn a dollar of revenue.

Q. Then if you were losing money prior to the war on 1.65 cents rate and making money since the war part of the time at the same coach rate, why it is necessary to increase that rate?

A. The answer to that is that rates and fares must bear a proper relation to a normal period of business. The fact that it was too low at one time and too high at another indicates the necessity of this leveling off to a common experience basis of comparison. In other words, you have no escalator clause in your tariff and no thermostat to adjust them up and down according to volume.

Q. In other words, you think that rates should be adjusted by looking backwards to the past?

A. No; as has been said, "I have but one lamp by which [fol. 430] my feet are guided, and that is the light of experience." Now, experience covers both good and bad, and rates and fares should be predicated on a normal volume of business, not exceedingly low or exceedingly high.

Q. I believe it is your position that your rate of return should be figured after Federal income taxes, including excess profit taxes.

A. It doesn't make a bit of difference which proceeding recognized by a proper rate of return.

Q. Prior to the war, Federal income tax, for example, on your railroad was considerably less than it is now?

A. Correct.

Q. So now taxes are increased, you are of the opinion you are entitled to increased revenue so you can pay taxes?

A. You can't pay unless you earn revenue.

Q. You want to shift the whole burden of that tax on the public?

A. No, merely collecting agency for the Government. You collect the money and turn it over to the Government.

Mr. Miller: That is all.

Exam. McGrath: Any further questions? (No response.) You are excused.

(Witness excused.)

Exam. McGrath: Any further testimony in this proceeding?

[fol. 431] Mr. Clark: I have one other thing here, Mr. Examiner. In connection with Mr. Barry's Exhibit No. 1, on the first page there is a decision of the Commission referred to where there was a 20 per cent increase in August, 1920, and I said to your Honor at the time that I thought it was Ex Parte 74. We have checked that and find that is correct, and the citation is 58 ICC Page 220.

Exam. McGrath: Is there anything further?

Mr. Clark: With that, we close our case.

Exam. McGrath: Do the parties desire to file briefs?

Mr. Clark: I think it would be well to file briefs.

Exam. McGrath: I will fix the date for filing briefs as January 29, 1944.

There will be no proposed report issued in this case.

Mr. Hillyer: May the record show that my present engagements will make it impracticable for me to attempt to get up this brief during the month of January?

Exam. McGrath: That wouldn't effect in itself any postponement of brief date. It will be necessary for you to take further steps if you want to get further action.

Mr. Clark: In view of the statement you made that there will be no proposed report, it seems to me I should probably make a request for oral argument; if we should later request it, we can withdraw that.

Mr. Hillyer: Since there will be no proposed report, may [fol. 432] we have an opportunity to file reply briefs?

Mr. Clark: I object to that.

Exam. McGrath: Not in a proceeding of this kind, reply briefs are not permitted. It hasn't been my experience that reply briefs has been authorized in these proceedings, and I have had a number of them.

If there is nothing further, the proceeding is closed.

(At 12:25 o'clock, p. m., December 29, 1943, the hearing was closed.)

[fol. 433] EXHIBIT No. 1—BARRY

From *April 1, 1908, to June 9, 1918*, inclusive, 2.5 cents per mile, in all classes of equipment.

From *June 10, 1918, to November 30, 1918*, inclusive, under order of the Director General of Railroads, 3 cents per mile, in all classes of equipment. During this period an additional charge of 16⅔% of the one-way fare was assessed for travel in sleeping and parlor cars.

From *December 1, 1918, to March 15, 1921*, inclusive, 3 cents per mile good in all classes of equipment. Effective August 26, 1920, by order of the Interstate Commerce Commission, the one-way fares were increased 20% or from 3 cents to 3.6 cents per mile plus a surcharge for passengers traveling in sleeping or parlor cars of 50% of the charge

for space occupied in such cars; however, in view of bill passed by the North Carolina General Assembly on August 25, 1920, fixing the intrastate passenger fare in North Carolina at 3 cents per mile this latter basis was observed until March 15, 1921, for intrastate traffic in North Carolina. The surcharge of 50% of the charge for space occupied for passengers traveling in sleeping or parlor cars was made effective in North Carolina on September 15, 1920, under order issued by the Corporate Commission of that State.

From *March 16, 1921, to November 30, 1933*, inclusive, 3.6 cents per mile good in all classes of equipment by Thirteenth Section Order of the Interstate Commerce Commission. During this period the 50% surcharge for passengers traveling in sleeping or parlor cars was continued in effect.

I might divert here a little and point out parenthetically that during the years 1932 and 1933 certain of the southern carriers decided as an experimental proposition to establish [fol. 434] lower fares in an attempt to attract additional travel to the railroads in competition with other forms of transportation, particularly with the private automobile and buses. For example, from April 1, 1933, to November 30, 1933, inclusive, the Atlanta and West Point RR.—Western Railway of Alabama, Mobile and Ohio Railroad (now Gulf, Mobile and Ohio Railroad), Louisville and Nashville Railroad and Nashville, Chattanooga and St. Louis Railway had in effect experimental one-way fares on basis of 3 cents per mile in sleeping or parlor cars without surcharge and 2 cents per mile in coaches. During this same period the Southern Railway System Lines were experimenting between various points on their lines with a fare 1.5 cents per mile, good for transportation in coaches only.

Continuing now with the chronological history:

From *December 1, 1933, to November 14, 1937*, inclusive, 3 cents per mile in sleeping or parlor cars and 1.5 cents per mile in coaches, except that the coach fare on certain roads such as the Illinois Central System, Mobile and Ohio Railroad (now Gulf, Mobile and Ohio Railroad) and St. Louis-San Francisco Railway was kept at 2 cents per mile. From September 1, 1936, to November 14, 1937, inclusive, the Atlantic Coast Line maintained a one-way coach fare on basis of 2 cents per mile; these latter roads meeting the 1.5 cents per mile competition between certain points.

From *November 15, 1937, to January 14, 1939*, inclusive, 3 cents per mile in sleeping or parlor cars and 2 cents per mile in coaches.

[fol. 435] From *January 15, 1939, to February 9, 1942*, inclusive, 3 cents per mile in sleeping or parlor cars and 1.5 cents per mile in coaches, except on certain lines such as the Gulf, Mobile and Ohio Railroad, Illinois Central System, St. Louis-San Francisco Railway coach fare was 2 cents per mile, competition being met between certain points.

From *February 10, 1942, to September 30, 1942*, inclusive, 3.3 cents per mile in sleeping or parlor cars and 1.65 cents per mile in coaches, except on lines of the Gulf, Mobile and Ohio Railroad, Illinois Central, and St. Louis-San Francisco Railway fare was 2.2 cents per mile, meeting competition between certain points.

A comparison of the authorized basic coach fares generally in effect in Southern Passenger Association territory for the several periods mentioned with the coach fare being sought in these proceedings, i. e., 2.2 cents per mile, which is the same coach fare currently in effect for interstate traffic, shows:

For the period *April 1, 1908, to June 9, 1918*, inclusive, the fares were approximately 13½% higher.

For the period *June 10, 1918, to August 25, 1920*, inclusive, the fares were approximately 36% higher.

For the period *August 26, 1920, to November 30, 1933*, inclusive, the fares were approximately 63½% higher.

On July 14, 1942, substantially all railroads operating in Southern Passenger Association Territory (except those roads which were maintaining at the time a coach fare of 2.2 cents per mile) filed a petition with the Interstate Commerce Commission for authority to place their one-way [fol. 436] coach fares on the same basis as in effect generally throughout the United States. When this petition was filed the great majority of the southern roads had in effect a coach fare on the basis of 1.65 cents per mile. However, certain roads, for example, the Gulf, Mobile and Ohio Railroad, Illinois Central System and St. Louis-San Francisco Railway, had in effect at that time coach fares on basis of 2.2 cents per mile, this being the same basis generally in effect throughout the rest of the United States.

The authority sought was granted by the Interstate Commerce Commission in its order dated August 1, 1942, modi-

fying the original order in Ex Parte 148, *Increased Railway Rates, Fares and Charges, 1942*, 248, I. C. C. 545, and the basis of coach fares authorized thereunder, i. e., 2.2 cents per mile for interstate traffic, was made effective on October 1, 1942.

When the petition referred to was filed with the Interstate Commerce Commission, no protest was filed with that body in connection with the proposed increase. However, after the Interstate Commerce Commission had entered its order of August 1, 1942, approving the increase and after tariffs had been filed as authorized by the Interstate Commerce Commission, Mr. Leon Henderson, then Price Administrator, filed a written protest and request for suspension. The Interstate Commerce Commission refused to suspend the tariffs and they became effective interstate, as previously stated, on October 1, 1942.

At present the basis of one-way coach fares generally maintained by the North Carolina carriers is 1.65 cents per mile.

Subsequent to the establishment of the interstate coach fares of 2.2 cents per mile, the carriers in Southern Passenger Association territory undertook to establish the same basis of coach fare intrastate in the several states by filing [fol. 437] petitions to do so with the Commissions in those states, the laws of which require that the authority of the State Commission be first obtained. In other states, in which no such requirement exists, tariffs designed to make effective the coach fare of 2.2 cents per mile were duly filed with the State Commissions.

The State Commissions of Florida, Georgia, Louisiana, Mississippi, South Carolina and Virginia have approved the proposed fares and they are now in effect.

The Alabama Public Service Commission denied the increases sought and a 13th Section proceeding was instituted, hearing on which was held in Montgomery, Alabama, June 28, 1943, and the matter is now before the Interstate Commerce Commission.

The Railroad Commission of Kentucky denied the increase requested in the coach fares, but permitted the Kentucky lines to put into effect the round-trip fares good for transportation in sleeping or parlor cars. A 13th Section proceeding was instituted, hearing on which was held in Frankfort, Ky., September 8, 1943, and the matter is now before the Interstate Commerce Commission.

The Railroad and Public Utilities Commission of Tennessee denied the increase sought and a 13th Section proceeding was instituted, hearing on which was held in Nashville, Tenn., on December 2, 1943, and the matter is now before the Interstate Commerce Commission.

The North Carolina Utilities Commission deferred its decision as to the increase requested in fares good for transportation in coaches, but approved the proposed changes in round-trip fares good for transportation in sleeping or parlor cars.

[fol. 438] The North Carolina Utilities Commission filed a petition with the Interstate Commerce Commission seeking an investigation by that body of the interstate coach fares to and from the State of North Carolina. Petitions were also filed with the Interstate Commerce Commission by the Alabama Public Service Commission and by Mr. Prentiss M. Brown, Price Administrator, on his own behalf and on behalf of the Hon. Fred M. Vinson, Director of Economic Stabilization, seeking an investigation by the Interstate Commerce Commission with respect to passenger coach fares charged by railroads in Southern Passenger Association territory. All of these petitions were denied by the Interstate Commerce Commission, October 11, 1943.

As the action of the North Carolina Utilities Commission was equivalent to a denial of the carriers' petition, a 13th Section petition was filed by the carriers with the Interstate Commerce Commission.

All of the North Carolina lines maintain a one-way coach fare of 2.2 cents per mile for interstate transportation and this same basis of fare is in effect for interstate transportation not only throughout the South but generally throughout the remainder of the United States.

To explain how it occurred that prior to October 1, 1942, some, but not all, of the southern railroads had in effect coach fare of only 1.65 cents per mile, whereas, the fare generally applicable in other parts of the country was 2.2 cents per mile: In Docket 26550, *Passenger Fares and Surcharges*, decided February 28, 1936, and reported in 214, I. C. C. 174, the Interstate Commerce Commission, after conducting an extended investigation, found that passenger fares of 2 cents per mile for transportation in coaches and 3 cents per mile for transportation in sleep-

ing or parlor cars throughout the United States would be [fol. 439] reasonable. In the same case the Commission referred to what it described as the "experimental coach fare" of 1.5 cents then being maintained by certain railroads in the Southeast and, although approving the reasonableness of a coach fare of 2 cents per mile, held that the reduced coach fare of 1.5 cents was not "unlawful."

As previously indicated, effective November 15, 1937, the Southeastern roads increased their basic one-way fare from 1.5 cents per mile to 2 cents per mile. Subsequently, certain of the Southeastern carriers, not including, however, the Illinois Central System, Gulf, Mobile and Ohio Railroad and the St. Louis—San Francisco Railway, and possibly some of the smaller roads, concluded it would be to their advantage to restore the former one-way coach fare of 1.5 cents per mile. This was done effective January 15, 1939.

By its order of January 21, 1942, in Ex Parte No. 148, the Interstate Commerce Commission, upon petition of the railroads operating throughout the United States, approved a uniform increase of ten percent in all passenger fares with certain provisions as to the disposition of fractions. Accordingly, passenger fares throughout the United States were increased ten percent effective February 10, 1942. The general basis of coach fares, i. e., 1.5 cents per mile, applicable in the Southeast, with the exceptions heretofore mentioned, automatically became 1.65 cents per mile. On the other hand, the former fare of 2 cents per mile which was being maintained by the railroads in all other parts of the country, including some of the railroads in the Southeast, became 2.2 cents per mile. This ten percent increase was also approved by the North Carolina Utilities Commission.

[fol. 440] In the original and reopened proceedings in Ex Parte 148, it is my understanding the Interstate Commerce Commission had before it a full and complete record of the facts concerning revenues, expenses, operating conditions, financial conditions, etc.

In the report and order of the Interstate Commerce Commission on the further hearing in Ex Parte 148, decided April 6, no modification was made in any way in its previous findings in connection with the present interstate standard passenger fares.

Passenger trains operating in the State of North Carolina carry both intrastate and interstate passengers who frequently ride on the same trains and in the same coaches and I know of no reason which would justify the maintenance of a one-way fare good for transportation in coaches of only 1.65 cents per mile within the State of North Carolina when a passenger to or from points within the State or passing through the State is required to pay 2.2 cents per mile.

With the present differences between the intrastate and the interstate fares, it is possible to defeat the interstate fares to and from points in North Carolina by purchasing an intrastate ticket for part of the trip. To illustrate: The published interstate one-way coach fare from Asheville, N. C., to Washington, D. C., (on basis of 2.2 cents per mile) is $10.19. It is possible to purchase a one-way coach ticket from Asheville, N. C., to Reidsville, N. C., at the intrastate fare of $3.65 (on basis of 1.65 cents per mile) and rebuy, or pay cash fare on the train, from Reidsville, N. C., to Washington, D. C., at interstate fare of $5.76 (on basis of 2.2 cents per mile), or total expenditure of $9.41, thus defeating the through published interstate fare by $1.08.

[fol.] I file Exhibit No. 2, consisting of four pages, giving a number of illustrations or examples of possible reductions in charges for interstate trips on tickets good for transportation in coaches only by purchasing a ticket at the intrastate fare for part of the trip to a given point and repurchasing or paying cash fare on train therefrom to destination. These examples are intended to be illustrative and could be multiplied almost indefinitely.

It is a difficult and almost impossible matter to prove that passengers defeat the interstate fares in the manner indicated, but it is common knowledge advantage has been taken by interstate passengers buying tickets at the lower intrastate fare to some points and rebuying from such points, or paying cash fares on trains to destinations. The condition which permits of this does exist but it is difficult to police.

I would now like to file Exhibit No. 3, consisting of three pages, giving a number of examples showing the fares paid for transportation good in coaches only by interstate passengers, also paid by intrastate passengers traveling

approximately equal distances between points in North Carolina. One of the examples shows that the interstate fare on basis of 2.2 cents per mile from Charlotte, N. C., to Danville, Va., a distance of 142 miles, is $3.15; whereas, the intrastate fare on basis of 1.65 cents per mile from Charlotte, N. C., to Asheville, N. C., a distance of 144 miles, or 2 miles greater, is but $2.40, a difference of 75 cents. The examples shown in this exhibit are only illustrative and could be multiplied indefinitely.

Under present conditions, the railroads encounter many unusual expenses in connection with passenger train operations. The handling of military movements necessarily entails substantial added costs. Equipment must be assembled at point of origin and this, in many instances, necessitates dead-heading equipment long distances. In [fol. 442] addition, after the movement has been completed the equipment must in many cases be returned from destination point.

To comply with the Government requirements, it is necessary for a "train escort" to ride troop trains. This, of course, is an added item of expense.

That proper protection may be accorded, in accordance with the requirements of the Government for military movements, it has been necessary to increase the personnel in general offices in order that such offices may be on duty, in some instances, for 24 hours each day and others from 12 to 16 hours per day. This also is an item of additional expense.

Because of the volume of military, as well as civilian, travel the railroads have been compelled not only to increase their general office forces but also to increase the forces in ticket agencies, another item of expense.

Large sums of money have been spent in the last decade in remodeling and air-conditioning passenger equipment all in an effort to recapture a portion of the traffic using other modes of transportation particularly from the highways. While the monies expended for these improvements have provided additional comforts and conveniences to the traveling public at, so far as coach travel is concerned, the lowest charges ever made by the railroads, it materially increased the cost of service.

The Southern Railway System Lines, alone, have air-conditioned, or purchased new with air-conditioning facili-

ties, 189 coaches. Many coaches have been remodeled to provide additional space for retiring and smoking rooms for both ladies and men, with soap, towels and drinking cups furnished without charge. In making these improvements, the seating capacity of the coaches was reduced roughly from 15 to 20 percent, or from 80 and 88 persons to 70 persons; 14 Southern Railway System coaches have [fol. 443] been equipped with reclining chairs and in these coaches the seating capacity was reduced almost 50 per cent or from 80 persons to 46 persons. This greatly decreased carrying capacity correspondingly, lowering the revenue per coach.

Southern Railway System Lines have purchased 6 new streamlined passenger trains with total of 21 coaches, 6 combination baggage coaches, 5 dining cars and 6 buffet coaches; 6 two-car diesel units and 16 diesel powered locomotives for passenger train service. Uniformed passenger representatives, whose sole duty is to give helpful service and assistance in making the passengers' trip comfortable and pleasant, accompany these trains. A hostess is also provided for these trains. Her duties are to look after the comfort of women and children. In addition, one attendant is assigned to each two coaches.

All of these facilities and services add to the cost of operations. They are available to North Carolina intrastate passengers as well as interstate passengers to or from North Carolina or passing through North Carolina, and the interstate passenger pays for this service on the basis of 2.2 cents per mile; whereas, the intrastate passenger pays but 1.65 cents per mile.

On Southern Railway System Lines, during the month of June, 1943 there were operated three hundred and forty-five (345) troop trains. Three hundred and seventeen (317) regular trains were operated in two sections and 1458 extra cars handling troops were operated in regular trains. During July there were operated on Southern Railway System Lines three hundred and thirty-seven (337) troop trains. Three hundred and fourteen (314) regular trains were operated in two sections and 1438 extra cars handling troops were operated in regular trains.
[fol. 444] Between points between which no land grant is involved, an allowance of 5 percent is made the Government from commercial fares of all classes.

Between points between which the fares apply via route where land grant deduction is applicable, either in whole or in part, land grant deduction of 50 percent is made from the commercial fare for that part of the route which is land grant and from the amount thus obtained an additional allowance of 3 percent is made.

At the time the one-way coach fare for interstate transportation was increased to 2.2 cents per mile upon request of the United States Government, an exception was made as to members of the Armed Forces in uniform on furlough. Reduced round-trip coach fares on the basis of 1¼ cents per mile were authorized for the personnel of the United States Army, Navy, Marine Corps, Coast Guard, Women's Naval Reserves, Women's Army Auxiliary Corps, Women's Coast Guard Reserves and Women's Marine Corps Reserves, traveling in uniform and at their own expense when on official leave, furlough or pass. This same fare is also accorded nurses, when not traveling in uniform, upon presentation of proper identification and, likewise, is accorded under similar conditions to the personnel of military forces of the several allied nations.

No proposal has been made to increase the round-trip coach fares for this character of traffic either interstate or intrastate.

So far I have dealt primarily with the matter of one-way coach fares, but the railroads are also here seeking to place their round-trip coach fares intrastate in North Carolina on the same basis as their round-trip interstate coach fares.

[fol. 445] Prior to October 1, 1942, in the Southern Passenger Association territory as well as in other territories, there were in effect round-trip coach fares constructed on various basic fares per mile and with varied return limits.

With the approval of the Interstate Commerce Commission, effective October 1, 1942, the lines generally in all territories in the United States adopted one character of round-trip coach fare to bear a uniform return limit of three months from date of sale and this character of round-trip coach fare is now in effect for interstate travel and likewise for intrastate travel in the southern states of Florida, Georgia, Louisiana, Mississippi, South Carolina and Virginia as well as in other sections of the country.

The round-trip coach fares good for interstate transportation and also for intrastate transportation in the states

named are constructed on the basis of 180 per cent of the one-way coach fare of 2.2 cents per mile, or 1.98 cents per mile for the distance traveled. The North Carolina carriers are seeking to establish exactly the same basis of round-trip fares for intrastate transportation in North Carolina as is now in effect for interstate traffic to and from points in North Carolina or passing through North Carolina as well as in the several states and other sections of the country heretofore mentioned. To accomplish this it is proposed that the current fifteen day limit round-trip coach fare on basis of 1.485 cents per mile and the sixty day round-trip coach fare on basis of 1.65 cents per mile be cancelled and that there be substituted in lieu thereof round-trip three months limit fare on the basis of 1.98 cents per mile.

[fol. 446] Now aside from any question of the revenue involved, the placing of the intrastate one-way and round-trip coach fares in North Carolina on the same level as the interstate coach fares would, under the existing conditions, be most helpful to ticket agents, conductors and others as it would assist materially in giving more prompt service as it would require only consulting the one publication in which the character of fare, or fares, desired was published. Whereas, at present interstate fares are published in one set of tariffs and the intrastate fares in others.

It must be remembered that the personnel in the ticket offices has been greatly increased and this personnel, of a necessity, is untrained and everything that would assist in simplifying the work is to be highly desired. This same statement applies with equal force to the new personnel in the general offices.

[fol. 447]

EXHIBIT No. 2—Witness: Barry

Southern Railway System

Examples of possible reductions of Interstate fares for tickets good for transportation in coaches only by purchasing to the point nearest the State Line at which trains are regularly scheduled to stop and rebuying therefrom to Interstate destinations.

Item			
1. Asheville, N. C. to Washington, D. C.	(2.2¢)		$10.49
Asheville, N. C. to Reidsville, N. C.	(1.65¢)	$3.65	
Reidsville, N. C. to Washington, D. C.	(2.2¢)	5.76	9.41
Saving			1.08
2. Asheville, N. C. to Charlottesville, Va.	(2.2¢)		7.99
Asheville, N. C. to Reidsville, N. C.	(1.65¢)	3.65	
Reidsville, N. C. to Charlottesville, Va.	(2.2¢)	3.26	6.91
Saving			1.08
3. Asheville, N. C. to Lynchburg, Va.	(2.2¢)		6.67
Asheville, N. C. to Reidsville, N. C.	(1.65¢)	3.65	
Reidsville, N. C. to Lynchburg, Va.	(2.2¢)	1.94	5.59
Saving			1.08
4. Charlotte, N. C. to Washington, D. C.	(2.2¢)		8.32
Charlotte, N. C. to Reidsville, N. C.	(1.65¢)	2.00	
Reidsville, N. C. to Washington, D. C.	(2.2¢)	5.72	7.72
Saving			0.60
5. Charlotte, N. C. to Richmond, Va.	(2.2¢)		6.23
Charlotte, N. C. to Reidsville, N. C.	(1.65¢)	2.00	
Reidsville, N. C. to Richmond, Va.	(2.2¢)	3.63	5.63
Saving			0.60
6. Charlotte, N. C. to Knoxville, Tenn.	(2.2¢)		6.09
Charlotte, N. C. to Hot Springs, N. C.	(1.65¢)	3.10	
Hot Springs, N. C. to Knoxville, Tenn.	(2.2¢)	2.05	5.15
Saving			0.94
7. Charlotte, N. C. to Norfolk, Va.	(2.2¢)		7.70
Charlotte, N. C. to Reidsville, N. C.	(1.65¢)	2.00	
Reidsville, N. C. to Norfolk, Va.	(2.2¢)	5.13	7.13
Saving			0.57
8. Charlotte, N. C. to Cincinnati, Ohio	(2.2¢)		12.65
Charlotte, N. C. to Hot Springs, N. C.	(1.65¢)	3.10	
Hot Springs, N. C. to Cincinnati, Ohio	(2.2¢)	8.62	11.72
Saving			0.93

[fol. 448]

9. Raleigh, N. C. to Knoxville, Tenn.	(2.2¢)		8.91
Raleigh, N. C. to Hot Springs, N. C.	(1.65¢)	5.25	
Hot Springs, N. C. to Knoxville, Tenn.	(2.2¢)	2.05	7.30
Saving			1.61
10. Raleigh, N. C. to Lexington, Ky.	(2.2¢)		13.13
Raleigh, N. C. to Hot Springs, N. C.	(1.65¢)	5.25	
Hot Springs, N. C. to Lexington, Ky.	(2.2¢)	6.82	12.07
Saving			1.06
11. Raleigh, N. C. to Atlanta, Ga.	(2.2¢)		9.31
Raleigh, N. C. to Grover, N. C.	(1.65¢)	3.65	
Grover, N. C. to Atlanta, Ga.	(2.2¢)	4.84	8.49
Saving			0.82

Item			
12. Greensboro, N. C. to Atlanta, Ga.	(2.2¢)		7.81
Greensboro, N. C. to Grover, N. C.	(1.65¢)	2.30	
Grover, N. C. to Atlanta, Ga.	(2.2¢)	4.84	7.14
Saving			0.67
13. Greensboro, N. C. to Nashville, Tenn.	(2.2¢)		11.92
Greensboro, N. C. to Hot Springs, N. C.	(1.65¢)	3.85	
Hot Springs, N. C. to Nashville, Tenn.	(2.2¢)	6.86	10.71
Saving			1.21
14. Greensboro, N. C. to New Orleans, La.	(2.2¢)		18.48
Greensboro, N. C. to Grover, N. C.	(1.65¢)	2.30	
Grover, N. C. to New Orleans, La.	(2.2¢)	15.73	18.03
Saving			0.45
15. Gastonia, N. C. to Washington, D. C.	(2.2¢)		8.80
Gastonia, N. C. to Reidsville, N. C.	(1.65¢)	2.40	
Reidsville, N. C. to Washington, D. C.	(2.2¢)	5.76	8.16
Saving			0.64
16. Gastonia, N. C. to Richmond, Va.	(2.2¢)		6.71
Gastonia, N. C. to Reidsville, N. C.	(1.65¢)	2.40	
Reidsville, N. C. to Richmond, Va.	(2.2¢)	3.63	6.03
Saving			0.68

[fol. 449]

17. Salisbury, N. C. to Birmingham, Ala.	(2.2¢)		10.38
Salisbury, N. C. to Grover, N. C.	(1.65¢)	1.50	
Grover, N. C. to Birmingham, Ala.	(2.2¢)	8.51	10.01
Saving			0.37
18. Salisbury, N. C. to Louisville, Ky.	(2.2¢)		12.14
Salisbury, N. C. to Hot Springs, N. C.	(1.65¢)	3.05	
Hot Springs, N. C. to Louisville, Ky.	(2.2¢)	8.18	11.23
Saving			0.91
19. Salisbury, N. C. to Memphis, Tenn.	(2.2¢)		15.36
Salisbury, N. C. to Hot Springs, N. C.	(1.65¢)	3.05	
Hot Springs, N. C. to Memphis, Tenn.	(2.2¢)	11.40	14.45
Saving			0.91
20. Durham, N. C. to Spartanburg, S. C.	(2.2¢)		4.99
Durham, N. C. to Grover, N. C.	(1.65¢)	3.30	
Grover, N. C. to Spartanburg, S. C.	(2.2¢)	0.77	4.07
Saving			0.92
21. Durham, N. C. to Atlanta, Ga.	(2.2¢)		9.06
Durham, N. C. to Grover, N. C.	(1.65¢)	3.30	
Grover, N. C. to Atlanta, Ga.	(2.2¢)	4.84	8.14
Saving			0.92
22. Durham, N. C. to Chattanooga, Tenn.	(2.2¢)		10.78
Durham, N. C. to Hot Springs, N. C.	(1.65¢)	4.85	
Hot Springs, N. C. to Chattanooga, Tenn.	(2.2¢)	4.47	9.32
Saving			1.46
23. Goldsboro, N. C. to Greenville, S. C.	(2.2¢)		7.00
Goldsboro, N. C. to Grover, N. C.	(1.65¢)	4.25	
Grover, N. C. to Greenville, S. C.	(2.2¢)	1.47	5.72
Saving			1.28

Item			
24. Goldsboro, N. C. to Knoxville, Tenn.	(2.2¢)		9.97
Goldsboro, N. C. to Hot Springs, N. C.	(1.65¢)	6.00	
Hot Springs, N. C. to Knoxville, Tenn.	(2.2¢)	2.05	8.05
Saving			1.92

[fol. 450]

25. Goldsboro, N. C. to Nashville, Tenn.	(2.2¢)		14.78
Goldsboro, N. C. to Hot Springs, N. C.	(1.65¢)	6.00	
Hot Springs, N. C. to Nashville, Tenn.	(2.2¢)	6.86	12.86
Saving			1.92
26. Winston-Salem, N. C. to Atlanta, Ga.	(2.2¢)		7.59
Winston-Salem, N. C. to Grover, N. C.	(1.65¢)	2.15	
Grover, N. C. to Atlanta, Ga.	(2.2¢)	4.84	6.99
Saving			0.60
27. Winston-Salem, N. C. to Columbia, S. C.	(2.2¢)		4.27
Winston-Salem, N. C. to Pineville, N. C.	(1.65¢)	1.65	
Pineville, N. C. to Columbia, S. C.	(2.2¢)	2.16	3.81
Saving			0.46
28. Winston-Salem, N. C. to Memphis, Tenn.	(2.2¢)		16.02
Winston-Salem, N. C. to Hot Springs, N. C.	(1.65¢)	3.50	
Hot Springs, N. C. to Memphis, Tenn.	(2.2¢)	11.40	14.90
Saving			1.12
29. Winston-Salem, N. C. to Augusta, Ga.	(2.2¢)		6.09
Winston-Salem, N. C. to Pineville, N. C.	(1.65¢)	1.65	
Pineville, N. C. to Augusta, Ga.	(2.2¢)	4.00	5.65
Saving			0.44
30. Marion, N. C. to Washington, D. C.	(2.2¢)		9.57
Marion, N. C. to Reidsville, N. C.	(1.65¢)	2.90	
Reidsville, N. C. to Washington, D. C.	(2.2¢)	5.76	8.66
Saving			0.91

[fol. 451]

EXHIBIT No. 2-A—Witness: Barry

Southern Railway System

Fares Shown and Exhibit 3 by Witness Barry are published in following Tariffs: Issued by E. N. Aiken, Assistant Passenger Traffic Manager, Atlanta, Ga.

Southern Railway System Local Passenger Tariff No. E-5, I. C. C. No. 8279
" " " " " " No. A-6, I. C. C. No. 8561
" " " " " " No. C-6, I. C. C. No. 8562
" " " " " " No. D-6, I. C. C. No. 8563
" " " " " " No. E-6, I. C. C. No. 8564
" " " " " " No. F-6, I. C. C. No. 8565
" " " " " " No. H-6, I. C. C. No. 8567
" " " " " " No. I-6, I. C. C. No. 8568
" " " " " " No. J-6, I. C. C. No. 8569
" " " " " " No. K-6, I. C. C. No. 8587
" " " " " " No. N-7, I. C. C. No. 8572
" " " " " " No. R-6, I. C. C. No. 8575
" " " " " " No. V-6, I. C. C. No. 8581
" " " " " " No. X-6, I. C. C. No. 8579
" " " " " " No. Y-6, I. C. C. No. 8583
" " " " " " No. AA-7, I. C. C. No. 8585

Southern Railway System Interdivision and Joint Passenger Tariff, No. 7, I. C. C. No. 8398, issued by E. N. Aiken.

Southern Railway System Interdivision and Joint Passenger Tariff, No. 8, I. C. C. No. 8589, issued by E. N. Aiken.

Cincinnati, New Orleans, and Texas Pacific Railroad Local Passenger Tariff, No. 11, I. C. C. No. 1353.

Alabama Great Southern Railroad Local Passenger Tariff, No. 10, I. C. C. No. 914.

New Orleans and Northeastern Railroad Local Passenger Tariff, No. 12, I. C. C. No. A-315.

[fol. 452]

EXHIBIT No. 3—Witness: Barry

Southern Railway System

Examples showing the fares paid for transportation good in coaches only by Interstate passengers, also paid by Intrastate passengers traveling equal distance between points in North Carolina.

Item		Distance Miles	One-Way Coach Fare	Difference in Cost in Favor Intrastate Passenger
1. Asheville, N. C. to Athens, Tenn.	(2.2¢)	184	$4.11	
Asheville, N. C. to Greensboro, N. C.	(1.65¢)	191	3.20	$0.91
2. Asheville, N. C. to Atlanta, Ga.	(2.2¢)	254	5.61	
Asheville, N. C. to Durham, N. C.	(1.65¢)	246	4.20	1.41
3. Asheville, N. C. to Chattanooga, Tenn.	(2.2¢)	240	5.32	
Asheville, N. C. to Durham, N. C.	(1.65¢)	246	4.20	1.12
4. Asheville, N. C. to Charleston, S. C.	(2.2¢)	293	6.49	
Asheville, N. C. to Henderson, N. C.	(1.65¢)	287	4.90	1.59
5. Asheville, N. C. to Columbia, S. C.	(2.2¢)	164	3.63	
Asheville, N. C. to Concord, N. C.	(1.65¢)	164	2.40	1.23
6. Asheville, N. C. to Knoxville, Tenn.	(2.2¢)	129	2.90	
Asheville, N. C. to Barber, N. C.	(1.65¢)	130	2.15	0.75
7. Asheville, N. C. to Johnson City, Tenn.	(2.2¢)	152	3.37	
Asheville, N. C. to Lexington, N. C.	(1.65¢)	158	2.70	0.67

EXHIBIT No. 3—Witness: Barry

Southern Railway System

Examples showing the fares paid for transportation good in coaches only by Interstate passengers, also paid by Intrastate passengers traveling equal distance between points in North Carolina.

Item		Distance Miles	One-Way Coach Fare	Difference in Cost in Favor Intrastate Passenger
8. Asheville, N. C. to Nashville, Tenn.	(2.2¢)	346	7.70	
Asheville, N. C. to Kinston, N. C.	(1.65¢)	347	5.80	1.90
9. Charlotte, N. C. to Anderson, S. C.	(2.2¢)	144	3.23	
Charlotte, N. C. to Durham, N. C.	(1.65¢)	149	2.60	0.63
10. Charlotte, N. C. to Augusta, Ga.	(2.2¢)	191	4.22	
Charlotte, N. C. to Selma, N. C.	(1.65¢)	204	3.20	1.02
11. Charlotte, N. C. to Danville, Va.	(2.2¢)	142	3.15	
Charlotte, N. C. to Ridgecrest, N. C.	(1.65¢)	142	2.40	0.75
12. Charlotte, N. C. to Easley, S. C.	(2.2¢)	118	2.60	
Charlotte, N. C. to Reidsville, N. C.	(1.65¢)	118	2.00	0.60
13. Charlotte, N. C. to Lynchburg, Va.	(2.2¢)	205	4.55	
Charlotte, N. C. to Selma, N. C.	(1.65¢)	203	3.20	1.35
[fol. 453]				
14. Charlotte, N. C. to Seneca, S. C.	(2.2¢)	145	3.19	
Charlotte, N. C. to Durham, N. C.	(1.65¢)	149	2.60	0.59
15. Charlotte, N. C. to Toccoa, Ga.	(2.2¢)	170	3.74	
Charlotte, N. C. to Raleigh, N. C.	(1.65¢)	175	2.90	0.84
16. Durham, N. C. to Clemson, S. C.	(2.2¢)	285	6.38	
Durham, N. C. to Hot Springs, N. C.	(1.65¢)	284	4.85	1.53
17. Durham, N. C. to Danville, Va.	(2.2¢)	103	2.31	
Durham, N. C. to Salisbury, N. C.	(1.65¢)	105	1.80	0.51
18. Gastonia, N. C. to Atlanta, Ga.	(2.2¢)	238	5.24	
Gastonia, N. C. to Goldsboro, N. C.	(1.65¢)	245	3.90	1.34
19. Greensboro, N. C. to Clemson, S. C.	(2.2¢)	230	5.14	
Greensboro, N. C. to Hot Springs, N. C.	(1.65¢)	229	3.85	1.29
20. Greensboro, N. C. to Easley, S. C.	(2.2¢)	212	4.73	
Greensboro, N. C. to Wilmington, N. C.	(1.65¢)	213	3.60	1.13
21. Greensboro, N. C. to Richmond, Va.	(2.2¢)	188	4.14	
Greensboro, N. C. to Asheville, N. C.	(1.65¢)	191	3.20	0.94
22. Goldsboro, N. C. to Danville, Va.	(2.2¢)	177	3.92	
Goldsboro, N. C. to Salisbury, N. C.	(1.65¢)	179	2.95	0.97
23. Goldsboro, N. C. to Aitavista, Va.	(2.2¢)	217	4.25	
Goldsboro, N. C. to Charlotte, N. C.	(1.65¢)	223	3.50	0.75
24. Goldsboro, N. C. to Charlottesville, Va.	(2.2¢)	301	5.61	
Goldsboro, N. C. to Ridgecrest, N. C.	(1.65¢)	302	5.05	0.56
25. Goldsboro, N. C. to Barboursville, Va.	(2.2¢)	318	5.98	
Goldsboro, N. C. to Asheville, N. C.	(1.65¢)	320	5.35	0.63
26. High Point, N. C. to South Boston, Va.	(2.2¢)	95	2.13	
High Point, N. C. to Raleigh, N. C.	(1.65¢)	96	1.70	0.43
[fol. 454]				
27. Raleigh, N. C. to Danville, Va.	(2.2¢)	129	2.86	
Raleigh, N. C. to Salisbury, N. C.	(1.65¢)	131	2.20	0.66
28. Raleigh, N. C. to Gaffney, S. C.	(2.2¢)	229	5.10	
Raleigh, N. C. to Marion, N. C.	(1.65¢)	230	3.85	1.25
29. Raleigh, N. C. to Greenville, S. C.	(2.2¢)	281	6.20	
Raleigh, N. C. to Asheville, N. C.	(1.65¢)	272	4.55	1.65
30. Salisbury, N. C. to Augusta, Ga.	(2.2¢)	235	5.21	
Salisbury, N. C. to New Bern, N. C.	(1.65¢)	238	3.95	1.26
31. Salisbury, N. C. to Clemson, S. C.	(2.2¢)	180	4.04	
Salisbury, N. C. to Hot Springs, N. C.	(1.65¢)	179	3.05	0.99

Item				
32. Salisbury, N. C. to Columbia, S. C.	(2.2¢)	152	3.37	
Salisbury, N. C. to Selma, N. C.	(1.65¢)	160	2.65	0.72
33. Winston-Salem, N. C. to Camden, S. C.	(2.2¢)	172	3.81	
Winston-Salem, N. C. to Asheville, N. C.	(1.65¢)	171	2.85	0.96
34. Winston-Salem, N. C. to Franklin, Va.	(2.2¢)	243	5.39	
Winston-Salem, N. C. to Wilmington, N. C.	(1.65¢)	241	4.05	1.34
35. Winston-Salem, N. C. to Spartanburg, S. C.	(2.2¢)	159	3.52	
Winston-Salem, N. C. to Goldsboro, N. C.	(1.65¢)	157	2.65	0.87

[fol. 455]

EXHIBIT No. 3-A—Witness: Barry

Southern Railway System

Fares and Distances shown in attached Exhibit 3 by Witness Barry published in the following Tariffs:

Issued by E. N. Aiken, Assistant Passenger Traffic Manager, Atlanta, Ga.

Southern Railway System Local Passenger Tariff No. A-5, I. C. C. No. 8279
" " " " " " No. E-5, I. C. C. No. 8283
" " " " " " No. F-5, I. C. C. No. 8284
" " " " " " No. H-5, I. C. C. No. 8286
" " " " " " No. I-5, I. C. C. No. 8287
" " " " " " No. J-5, I. C. C. No. 8288
" " " " " " No. A-6, I. C. C. No. 8561
" " " " " " No. C-6, I. C. C. No. 8562
" " " " " " No. D-6, I. C. C. No. 8563
" " " " " " No. E-6, I. C. C. No. 8564
" " " " " " No. F-6, I. C. C. No. 8565
" " " " " " No. H-6, I. C. C. No. 8567
" " " " " " No. I-6, I. C. C. No. 8568
" " " " " " No. J-6, I. C. C. No. 8569
" " " " " " No. L-6, I. C. C. No. 8570
" " " " " " No. M-6, I. C. C. No. 8571
" " " " " " No. N-7, I. C. C. No. 8572
" " " " " " No. O-6, I. C. C. No. 8573
" " " " " " No. V-6, I. C. C. No. 8581

Blue Ridge Railroad Company Local Passenger Tariff No. 6, I. C. C. No. 11.

Virginia-Carolina Joint Tariff A-15, I. C. C. No. H 4065 issued by C. B. Rhodes, Agent.

Southern Railway System Interdivision and Joint Passenger Tariff, No. 7, I. C. C. No. 8398, issued by E. N. Aiken.

Southern Railway System Interdivision and Joint Passenger Tariff, No. 8, I. C. C. No. 8589, issued by E. N. Aiken.

And Official Railway Guide.

[fol. 456]

EXHIBIT No. 4—Beuchler

Statement of the Number of Coach Tickets Sold for the Calendar Month of November 1943, To and From the Following Points

				Miles	Tickets
Item No. 1—	Knoxville, Tenn.	To	Asheville, N. C.	131	141
	Charlotte, N. C.	to	Asheville, N. C.	144	73
		vs.			
	Asheville, N. C.	to	Knoxville, Tenn.	131	153
	Asheville, N. C.	to	Charlotte, N. C.	144	64
Item No. 2—	Danville, Va.	to	Greensboro, N. C.	48	151
	Charlotte, N. C.	to	Greensboro, N. C.	94	473
		vs.			
	Greensboro, N. C.	to	Danville, Va.	48	170
	Greensboro, N. C.	to	Charlotte, N. C.	94	362
Item No. 3—	Spartanburg, S. C.	to	Charlotte, N. C.	75	383
	Greensboro, N. C.	to	Charlotte, N. C.	94	362
		vs.			
	Charlotte, N. C.	to	Spartanburg, S. C.	75	252
	Charlotte, N. C.	to	Greensboro, N. C.	94	473
Item No. 4—	Greensboro, N. C.	to	Gastonia, N. C.	115	59
	Winston-Salem, N. C.	to	Gastonia, N. C.	105	10
		vs.			
	Gastonia, N. C.	to	Greenville, S. C.	85	73
	Gastonia, N. C.	to	Winston-Salem, N. C.	105	39
Item No. 5—	Columbia, S. C.	to	Charlotte, N. C.	108	319
	Greenville, S. C.	to	Charlotte, N. C.	107	443
		and			
	Charlotte, N. C.	to	Columbia, S. C.	108	234
	Charlotte, N. C.	to	Greenville, S. C.	107	239
		vs.			
	Charlotte, N. C.	to	Greensboro, N. C.	94	473
	Greensboro, N. C.	to	Charlotte, N. C.	94	362

Office of
Auditor of Passenger Accounts
Atlanta, Ga., December 24, 1943
File B-16-NC

[fol. 457]

EXHIBIT No. 5—Witness Lynch

Atlantic Coast Line Railroad Company
Passenger Traffic Department

Statement Showing Manner in Which the Lower Basis of Fares
(For travel in coaches)
Intrastate in North Carolina Makes It Possible for Passengers to Defeat the Through Published Interstate Fares.

	One-Way Interstate Coach Fare			Difference in Fares
		Richmond-Weldon	$1.83 Interstate	
		Weldon-Fayetteville	2.15 Intrastate	
Richmond, Va. to Fayetteville, N. C.	$4.66		$3.98	$0.68
		Richmond-Rocky Mt.	$2.68 Interstate	
		Rocky Mt.-Wilmington	2.10 Intrastate	
Richmond, Va. to Wilmington, N. C.	$5.43		$4.78	$0.65
		Norfolk-Rocky Mt.	$2.57 Interstate	
		Rocky Mt.-Wilmington	2.10 Intrastate	
Norfolk, Va. to Wilmington, N. C.	$5.32		$4.67	$0.65
		Norfolk-Rocky Mt.	$2.57 Interstate	
		Rocky Mt.-Fayetteville	1.55 Intrastate	
Norfolk, Va. to Fayetteville, N. C.	$4.58		$4.12	$0.46

Between Norfolk, Va. and Wilmington, N. C. thru train is operated #49 leaving Norfolk, Va. 7:55 AM arriving Wilmington, N. C. 6:30 PM and thru passengers purchase coach ticket at *interstate* fare of $5.32, whereas the evening train #43-41 leaves Norfolk 7:15 PM arrives Rocky Mount, N. C. 11:35 PM and the connecting train #41 leaves Rocky Mount, N. C. 3:00 AM arriving Wilmington, N. C. 8:45 AM, thus affording passengers an opportunity to buy interstate tickets to Rocky Mount, N. C. and intrastate tickets Rocky Mount, N. C. to Wilmington, N. C., thereby reducing the thru interstate fare 75c.

[fol. 458]

EXHIBIT No. 6—Witness Lynch

Atlantic Coast Line Railroad Company
Passenger Traffic Department

Statement Showing Manner in Which the Lower Basis of Fares
(For travel in coaches)

Intrastate in North Carolina makes it possible for passengers to travel between two given points where routing on the one hand involves an intrastate journey and routing on the other hand involves an interstate journey.

Between	Route	Interstate	Intrastate	Difference
Wilmington, N. C. and Asheville, N. C.	ACL Goldsboro thence Sou. Ry.	.....	$5.55	.....
	ACL Columbia, S. C. thence Sou. Ry.	$7.33	.....	$1.78

[fol. 459]

EXHIBIT No. 7—Witness Lynch

Atlantic Coast Line Railroad Company
Passenger Traffic Department

Statement Showing Manner in Which the Lower Basis of Fares
(For travel in coaches)

Intrastate in North Carolina results in direct discrimination against interstate passengers enroute to the same destination traveling approximately the same distance.

Between	Distance	Interstate	Intrastate	Difference
Mullins, S. C. and Hallsboro, N. C.	40.2	$0.92	.....	.....
Wilmington, N. C. and Hallsboro, N. C.	40.4	.....	$0.72	$0.20
Florence, S. C. and Wilmington, N. C.	109.9	$2.42	.....	.....
Wilson, N. C. and Wilmington, N. C.	108.8	.....	$1.80	$0.62

[fols. 460–461]

EXHIBIT No. 8—Witness Lynch

Atlantic Coast Line Railroad Company
Passenger Traffic Department

Statement Showing Manner in Which the Lower Basis of Fares
(For travel in coaches)

Intrastate in North Carolina Results in Direct Discrimination against Interstate Passengers

(Traveling on the same train)

Atlantic Coast Line Railroad Company Trains No. 89 and No. 80 operate between Richmond, Va. and Florence, S. C. and carry interstate passengers between points in Virginia and North Carolina to destinations in North Carolina and South Carolina, and vice-versa. The same trains carry *intrastate* passengers between points in North Carolina.

From	To	Distance	Interstate Fare (2.2¢ per mile)	Intrastate Fare (1.65¢ per mile)
Fayetteville, N. C.	Florence, S. C.	82.8	$1.83	
Weldon, N. C.	Smithfield, N. C.	82.8	.....	$1.45

The intrastate passenger travels on the same train as the interstate passenger, is furnished the same accommodations, both travel the same distance, but the intrastate passenger pays 38¢ less than the interstate passenger.

[fol. 462]

Statistical Findings and Data in Support Thereof

1. Had increase sought in intrastate passenger fares and charges between points in North Carolina been in effect between December 1, 1942 and September 30, 1943, $465,578 additional would have been earned by the thirteen railroads parties to the petition in this case. Raised to a year's basis, that would amount to $575,652. For the twelve months ended February 28, 1943 the amount would have been $432,150, and for the twelve months ended Sept. 30, 1943, $566,823.
2. For many years past passenger operations of these railroads have been in the red. For Atlantic Coast Line, Clinchfield, L&N, Norfolk Southern, Seaboard and Southern, the six principal railroads here involved, from 1936 to 1940, both inclusive, in a range from 16 to 19 millions of dollars, the average deficit has been 18 millions. In 1941 there was a drop to 8 millions. In 1942 there was an income of 27 millions. The average deficit for the seven-year period (1936–42) was 10 millions. The six-year cumulative deficit, 1936 to 1941, both inclusive, was 99 millions, in order to offset which at least four years as good as 1942 must be anticipated.
3. Railroads of the Southern Region, in common with railroads of the country in general, are chronically in need of additional revenue. For example, for the average of ten years (1921–30) Class I Railroads of Southern Region earned only 4.20% on their investment in railway property used in transportation service.
For the succeeding twelve years (1931–42) the yield was but 2.48%, while for the 22-year period (1921–42) it was but 3.23%.
4. Specifically, for the 22-year period (1921–42), petitioners herein earned only 3.41% on their investment.
5. Weighting the return for each road in proportion to mileage operated, entire line in comparison with in the State of North Carolina, produces 3.29% and 3.09%, respectively.
6. This means that, if a 5¾% return on investment is to be realized, revenues on a system-wide basis should be increased by 12%, and as as referenced to the State of North Carolina by 13%. In other words, North Carolina burdens the comparison by one percentage point.
7. That the basis of measurement (investment in railway property used in transportation service) here utilized is conservative, is evidenced by the fact that it would have to be increased by 9% in order to equal ICC Bureau of Valuation's appraisal new, including land, as of January 1, 1940.

[fol. 463]

8. For the average year of seven (1936–42) for the six principal roads, the freight operating ratio was 62 as compared with 100 for passenger.
9. For the same period and roads, adding to railway operating expenses, railway tax accruals and net operating rents payable produces an outgo ratio of 75 for freight as compared with 116 for passenger.
10. From 1936 to 1940, inclusive, passenger carrying cars earned 15 cents per mile on the average. In 1941 that jumped to 22 cents and in 1942 to 40 cents. Average for the seven-year period (1936–42) was 22 cents.
11. Cars in baggage, mail, express and milk service, popularly known as head-end cars, in a range from 21¢ to 26¢, earned on the average 25¢ per mile. 10¢ per mile more than normal for rear-end cars.

Statistical Findings and Data in Support Thereof—Continued

12. Average earning in coaches has been 1.5¢ per passenger mile.
13. Average in parlor and sleeping cars has been 2.4¢ per passenger mile.
14. In a range from 20¢ to 52¢, with a flat average of 31¢, coaches have earned as a whole 21¢ per mile.
15. In a range from 22¢ to 52¢, with a flat average of 30¢, parlor and sleeping cars have earned on the whole 24¢ per mile.
16. For the average of seven years (1936–42), railway tax accruals were twice as high as in 1936. In 1941 they were 2¼ and in 1942 six times as high.
17. As apportioned to passenger, they were 1.25 times as high in 1941, 4.46 times as high in 1942, and 1.63 times as high for the seven-year average.
18. Index of hourly compensation (all employees) had risen 19 points in 1941, 37 points in 1942 and 12 points on the average over 1936.
19. As of June 1, 1943, compared with October 1, 1936, price of forest products had increased by 93 points; iron and steel products by 21 points; miscellaneous products by 18 points; fuel by 47 points; and total (including fuel) by 40 points.
20. In a range from 48 to 80, passengers averaged 66 per train, 1916 to 1920, inclusive.
21. From 1921 to 1930, inclusive, this average was 48, in a range from 31 to 57.

[fol. 464]

22. From 1931 to 1940, inclusive, the average was 38, in a range from 24 to 54.
23. These averages jumped to 75 in 1941, 146 in 1942 and 211 January-July 1943.
24. Pay passengers per car, 1916–20, averaged 17 in a range from 13 to 20.
25. The 1921–30 average was 12, in a range from 9 to 14.
26. The 1931–40 average was 9, in a range from 6 to 11.
27. In 1941 this average had jumped to 14, in 1942 to 23 and January-July, 1943 to 31.
28. Pay passengers per coach averaged 21, 1937–42, in a range from 11 to 34. For the months of 1943 available (January-July) this average jumped to 45.
29. Pay passengers in parlor and sleeping cars averaged 12, 1937 to 1942, inclusive, in a range from 9 to 19. For the months of 1943 available (January-July), this average jumped to 24.

[fol. 465] Loss in Passenger Revenue Reflected by What Would Have Accrued Had Increase Sought in Intrastate Fares Been in Effect in the State of North Carolina during the Periods Shown Below

Roads	—Loss in Intrastate Revenue— Year Ended 2/28/43	Year Ended 9/30/43	10 Mos. Ended 9/30/43
Aberdeen & Rockfish R. R. Co.	.....	.....	.....
Atlantic & East Carolina Railway Company	$3,119	$4,173	$3,604
Atlantic Coast Line Railroad Company	83,316	96,235	69,816*
Carolina & Northwestern Railway Company	1,985	2,532	2,203
Carolina & Tennessee Southern Railway Company †	.....	.....	.....
Carolina, Clinchfield & Ohio Railway C. C. & O. Ry. of South Carolina Lessees: A. C. L. and L. & N.	3,487	4,444	3,863
Danville & Western Railway Company	5	3	1
Louisville & Nashville Railroad Company	14	21	19
Norfolk Southern Railway Company	8,753	12,041	10,690
Seaboard Air Line Railway Company	63,594	75,814*	57,412*
Southern Railway Company	267,877	371,560	317,970
Winston-Salem Southbound Railway Company	.....	.....	.....
Total	$432,150	$566,823	$465,578

* 12 and 9 months ended August 1943.
† Road abandoned.
SOURCE: Audit departments of the several roads.

[fol. 466]

Net Railway Operating Income or Deficit—Passenger
(As Required to be Computed by Interstate Commerce Commission and Annually Reported Thereto)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1936	1937	1938	1939	1940	1941		1942	Average
A C L	$2,790,052	$2,492,414	$3,518,586	$4,291,109	$4,194,042	$1,200,663	I	$4,446,553	$2,005,759
Clinchfield #	91,828	129,061	124,231	131,743	112,151	89,613		84,999	109,089
L & N	5,429,064	5,887,764	6,556,946	6,404,436	6,815,661	4,915,654	I	2,069,686	4,848,548
Nor. Sou.	210,807	226,344	195,323	171,009	211,985	184,417		134,600	190,641
Seaboard	3,955,652	3,207,798	4,083,514	2,997,095	2,807,430	1,033,934	I	10,654,634	1,061,256
Southern	3,951,429	4,176,195	4,994,845	4,873,672	5,222,582	927,503	I	9,748,714	2,056,787
Total	$16,426,832	$16,119,576	$19,473,445	$18,869,064	$19,363,851	$8,351,784	I	$26,699,988	$10,272,080

Data for the following roads not available:
Aberdeen and Rockfish.
Atlantic and East Carolina.
Carolina & Northwestern.
Danville & Western.
Winston-Salem Southbound.
Carolina and Tennessee Southern Railway omitted on account of abandonment on August 15, 1943.

I—Denotes Income.

SOURCE: Annual Reports to Interstate Commerce Commission.

Cumulative Deficits, 1936-1941 $98,604,552
Years like 1942 required to wipe out—4.

Carolina Clinchfield and Ohio Railway and Carolina, Clinchfield and Ohio Railway Company of South Carolina.

[fol. 467]

Southern Region Revenues, Expenses and Net Income, Railways of Class I—Years 1921–1942

Year	Investment in Railway Property used in transportation service [a]	Total Operating Revenues	Total Operating Expenses	Taxes	Net Railway Operating Income Amount	Rate of Return		Net Income
1921	$2,544,543,695	$ 684,727,318	$589,349,969	$ 30,058,104	$ 57,840,946	2.27%		$ 7,841,591
1922	2,591,156,704	711,489,119	554,924,589	37,636,117	109,696,782	4.23		55,791,992
1923	2,740,319,955	807,900,577	627,558,235	42,177,128	129,644,627	4.73		77,507,509
1924	2,848,043,577	787,949,317	594,875,149	44,982,899	112,445,074	5.00		86,311,303
1925	2,989,620,741	846,581,262	616,488,300	50,957,654	167,565,759	5.60		112,068,078
1926	3,155,883,365	874,464,159	646,031,708	53,857,054	163,046,381	5.17		105,154,742
1927	3,236,589,190	813,166,422	618,642,232	50,644,073	136,488,599	4.22		77,275,619
1928	3,292,527,033	771,814,281	582,088,993	50,940,833	133,545,258	4.06		72,234,499
1929	3,324,161,166	767,324,856	579,047,334	51,147,375	132,634,559	3.99		73,059,468
1930	3,338,881,112	641,628,178	503,008,762	42,974,495	88,405,628	2.65		30,860,679
Avg. 1921–30	3,006,173,253	770,704,548	591,201,527	45,537,572	126,128,361	4.20		69,810,548
1931	3,321,736,996	515,584,069	424,823,685	36,863,350	44,119,880	1.33	D	22,562,485
1932	3,300,356,863	377,781,440	312,379,830	31,784,693	25,802,843	0.78	D	48,626,465
1933	3,245,727,101	388,514,453	291,234,184	28,256,926	59,677,490	1.84	D	16,048,078
1934	3,214,398,995	408,242,449	315,267,590	27,034,974	54,520,803	1.70	D	19,228,469
1935	3,182,822,004	429,651,453	342,529,025	28,079,336	49,301,947	1.55	D	24,736,251
1936	3,174,468,831	500,904,542	371,241,330	37,018,915	80,146,408	2.52		10,743,969
1937	3,155,343,353	516,590,873	390,555,654	39,199,291	74,160,012	2.35		6,601,155
1938	3,173,336,647	471,305,776	357,486,929	42,056,626	60,204,023	1.90	D	9,734,450
1939	3,183,259,365	512,031,356	378,090,053	43,853,775	79,592,778	2.50		11,667,811
1940	3,184,435,186	545,276,358	404,502,838	48,623,247	81,939,906	2.57		15,726,381
1941	3,273,594,731	698,242,859	472,968,083	76,416,137	138,673,394	4.24		74,845,799
1942	3,338,644,861	1,052,924,537	622,964,370	194,186,597	214,151,928	6.41		153,250,208
Avg. 1931–42	$3,229,010,410	$ 534,754,180	$390,336,964	$ 52,781,156	$ 80,190,951	2.48		$ 10,991,594
Avg. 1921–42	$3,127,720,794	$ 642,004,348	$481,639,038	$ 49,488,617	$101,071,592	3.23		$ 37,727,482

D—Denotes Deficit. [a] Includes allowance for working capital.

SOURCE: Association of American Railroads—Bureau of Railway Economics.

[fol. 468]

Average Annual Rate of Return—1921-1942, Inclusive
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	Investment in Ry. Property Used in Transp. Service including Cash and Material & Supplies	Net Railway Operating Income	Rate of Return
Aberdeen & Rockfish	$479,680	$24,549	5.12%
Atlantic & East Carolina*	1,473,893	33,523	2.27
Atlantic Coast Line	286,980,675	8,898,620	3.10
Carolina & Northwestern	4,097,191	136,220	3.32
Clinchfield	72,291,593	2,847,657	3.94
Danville & Western	2,339,060	93,362	3.99
Louisville & Nashville	469,700,457	17,700,720	3.77
Norfolk Southern	36,175,860	817,.63	2.26
Seaboard Air Line	287,163,807	6,944,691	2.42
Southern	612,069,932	22,891,307	3.74
Winston-Salem Southbound	6,564,058	212,550	3.24
Total	$1,779,336,206	$60,600,762	3.41

SOURCE: Annual Reports to ICC and reports of carriers to the Association of American Railroads—Bureau of Railway Economics.

* Average 1935-1942.

[fol. 469]

Average Rates of Return—1921-1942
Weighted in Proportion to Miles of Road Operated at Close of Year
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	Entire Line			In State of North Carolina		
	Miles	Return	Weighting	Miles	Return	Weighting
Aberdeen & Rockfish	45	5.12	230	45	5.12	230
Atlantic & East Carolina*	97	2.27	220	97	2.27	220
Atlantic Coast Line	4,991	3.10	15,472	1,054	3.10	3,267
Carolina & Northwestern	113	3.32	375	76	3.32	252
Clinchfield	308	3.94	1,214	117	3.94	461
Danville & Western	55	3.99	219	9	3.99	36
Louisville & Nashville	4,745	3.77	17,889	13	3.77	49
Norfolk Southern	734	2.26	1,659	634	2.26	1,433
Seaboard Air Line	4,184	2.42	10,125	630	2.42	1,525
Southern	6,514	3.74	24,362	1,202	3.74	4,495
W-Salem Southbound	98	3.24	318	98	3.24	318
Total	21,884	3.29	72,083	3,975	3.09	12,286

* Based on 1935-1942.

SOURCE: Annual Reports to ICC and reports of carriers to the Association of American Railroads—Bureau of Railway Economics.

[Vol. 470]

Fact and Extent of Revenue Need
Average Year of 22 (1921–1942, Inclusive)
Weighted in Proportion to Miles of Road Operated at Close of Year 1942
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	Entire Line			In State of North Carolina		
	Miles	Ratio	Weighted	Miles	Ratio	Weighted
Aberdeen & Rockfish	45	101	4,545	45	101	4,545
Atlantic & East Carolina*	...	...	...	...	...	...
Atlantic Coast Line	4,991	111	554,001	1,054	111	116,994
Carolina & Northwestern	113	113	12,769	76	113	8,588
Clinchfield	308	116	35,728	117	116	13,572
Danville & Western	55	108	5,940	9	108	972
Louisville & Nashville	4,745	109	517,205	13	109	1,417
Norfolk Southern	734	118	86,612	634	118	74,812
Seaboard Air Line	4,184	118	493,712	630	118	74,340
Southern	6,514	109	710,026	1,202	109	131,018
Winston-Salem Southbound	98	114	11,172	98	114	11,172
Total	21,787	112	2,431,710	3,878	113	437,430

* Not available.

SOURCE: Annual Reports to ICC and reports of carriers to the Association of American Railroads—Bureau of Railway Economics.

[fol. 471]

Elements of Value of Property Used in Common Carrier Service as of January 1, 1940

Railroads Operating in State of North Carolina

(Petitioners in This Proceeding)

Roads	Basis A Production Cost	Basis B Reproduction Estimate	Current Appraisal		Capital Outlay	
			Lands	Working Capital	Basis A	Basis B
Atlantic Coast Line	$261,004,816	$303,319,011	$20,864,432	$3,542,800	$285,412,048	$327,726,243
Clinchfield	48,909,591	52,237,313	905,700	414,400	50,229,691	53,557,413
Louisville & Nashville	500,444,673	569,677,300	25,805,045	8,377,500	534,627,218	603,859,845
Nor. Sou.	24,177,870	27,503,633	2,166,895	395,000	26,739,765	30,065,528
Seaboard Air Line	238,216,451	257,154,989	15,905,922	3,654,700	257,777,073	276,715,611
Southern	493,419,141	575,189,378	46,116,614	5,732,800	545,268,555	627,038,792
Total	$1,566,172,542	$1,785,081,624	# $111,764,608	# $22,117,200	$1,700,054,350	$1,918,963,432
Ratio	100	114			100	113

Data for the following roads not available:
Aberdeen and Rockfish.
Atlantic and East Carolina.
Carolina and Northwestern.
Danville and Western.
Winston-Salem Southbound.

SOURCE: Exhibit A-11, Ex Parte No. 148.

$1,896,846,232 in comparison with 1,746,930,993 as per ICC A. R. Sch. 211 N.

Ratio of increase 9%.

[fol. 472]

Freight and Passenger Operating Ratios
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1936		1937		1938		1939		1940		1941		1942		Average	
	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.
Atlantic Coast Line	67	108	68	105	70	114	66	122	67	118	61	96	51	64	62	95
Clinchfield	54	170	51	198	53	195	46	222	46	195	40	164	41	144	46	181
L & N	65	130	68	134	67	143	65	142	65	144	58	119	56	72	62	115
Nor. Southern	76	175	75	189	78	198	75	188	76	218	70	193	63	109	72	171
Seaboard	70	138	70	125	74	134	73	119	72	113	69	98	61	60	68	97
Southern	62	112	65	109	62	115	60	116	61	118	58	94	55	57	60	93
Total	65	120	67	117	67	125	64	124	64	123	60	101	55	63	62	100

Data for the following roads not available:
Aberdeen and Rockfish.
Atlantic and East Carolina.
Carolina & Northwestern.
Danville & Western.
Winston-Salem Southbound.

SOURCE: Reports of carriers to the Interstate Commerce Commission.

[fol. 473]

Freight and Passenger Outgo Ratios
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1936		1937		1938		1939		1940		1941		1942		Average	
	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.	Frt.	Pass.
Atlantic Coast Line	78	126	79	121	82	133	78	142	79	136	76	107	86	86	79	114
Clinchfield	57	192	51	224	59	228	52	257	55	228	50	186	41	144	51	204
L & N	70	150	74	153	74	164	72	163	73	164	71	136	84	93	75	135
Nor. Sou.	88	196	88	209	90	223	88	212	90	245	81	214	82	138	86	195
Seaboard	78	153	78	137	83	152	81	131	81	126	78	107	80	68	77	108
Southern	71	124	76	124	74	133	70	132	71	134	72	104	77	78	73	110
Total	73	136	76	133	76	144	73	142	74	140	73	113	78	81	75	116

Date for the following roads not available:
Aberdeen and Rockfish.
Atlantic & East Carolina.
Carolina & Northwestern.
Danville & Western.
Winston-Salem Southbound.

SOURCE: Reports of carriers to the Interstate Commerce Commission.

[fol. 474] (102) Passenger, (104) Sleeping Car, (105) Parlor and Chair Car, (108) Other Passenger Train Revenue, and (131) Dining and Buffet Revenue Per Passenger Carrying Car Mile (Cents)—

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	1936	1937	1938	1939	1940	1941	1942	Average
Aberdeen & Rockfish	15.13	20.58	19.95	18.14	33.63	23.91	31.36	27.14
A & E C	8.56	8.87	8.33	5.05	9.44	11.03	29.45	11.35
A C L	15.74	16.99	16.27	14.77	16.17	21.37	36.59	20.89
C & N W	9.71	8.57	6.67	5.64	5.37	5.10	9.20	7.27
Clinchfield	8.95	9.20	7.48	6.61	7.23	9.16	13.87	8.95
D & W	5.76	10.22	6.29	5.10	3.82	2.73	3.05	4.90
L & N	14.18	15.21	13.72	13.51	14.11	18.17	35.97	18.87
Nor. Sou.	11.61	10.43	8.81	8.38	9.50	14.58	30.29	13.79
S A L	15.61	16.70	16.09	18.38	19.88	24.41	44.22	24.58
Southern	16.03	16.96	15.85	15.92	16.60	22.51	45.10	22.47
W-S S-B	No Passenger Carrying Car Miles Reported							
Total	15.37	16.43	15.39	15.46	16.50	21.56	40.49	21.53

SOURCE: Computed from Reports of the carriers to the Interstate Commerce Commission.

[fol. 475] (103) Baggage, (106) Mail, (107) Express, and (109) Milk Revenue Per Car Mile (Cents)

Railroads Operating in State of North Carolina

(Petitioners in This Proceeding)

Roads	1936	1937	1938	1939	1940	1941	1942	Average
Aberdeen & Rockfish	*	43.35	39.48	39.42	39.82	46.79	55.69	43.60
Atlantic & East Caro.	26.45	35.00	38.25	30.95	25.90	25.25	42.76	31.17
Atlantic Coast Line	19.41	18.47	17.48	17.39	16.74	18.21	19.80	18.24
Caro. & Northwestern	24.45	21.32	21.25	23.17	22.59	26.28	26.87	23.68
Clinchfield	27.57	29.74	34.15	38.83	37.10	38.58	42.08	34.78
Danville & Western	46.77	33.60	31.99	27.70	21.67	23.99	33.34	29.75
Louisville & Nashville	30.93	29.22	28.06	29.08	28.38	29.00	29.81	29.22
Norfolk Southern	23.29	27.90	21.91	24.79	21.31	18.55	18.45	22.17
Seaboard Air Line	19.38	19.58	20.72	21.81	21.32	21.22	22.12	20.89
Southern	32.70	31.72	30.65	29.98	27.82	28.76	31.21	30.20
Winston-Salem Southbound					Not available			
Average, excl. WSSB	25.76x	24.84	24.39	24.44	23.58	24.44	25.92	24.79

SOURCE: Computed from reports of the carriers to the Interstate Commerce Commission.

* Not Reported.

x Average excluding A & R Revenue 25.75 24.79

[fol. 476]

Revenue Per Passenger Mile (Cents)—Coaches (Other Than Commutation)
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1937	1938	1939	1940	1941	1942	Average
A C L	1.567	1.809	1.395	1.344	1.364	1.511	1.472
Clinchfield	1.580	2.018	1.511	1.480	1.483	1.653	1.608
L & N	1.496	1.788	1.403	1.395	1.437	1.578	1.520
Norf. Sou.	1.575	2.074	1.725	1.638	2.050	2.007	1.874
S A L	1.493	1.791	1.442	1.416	1.389	1.538	1.490
Southern	1.447	1.824	1.345	1.291	1.423	1.600	1.507
Average	1.494	1.806	1.395	1.362	1.403	1.560	1.499

Data for following roads not available:
Aberdeen & Rockfish.
Atlantic & East Carolina.
Carolina & Northwestern.
Danville & Western.
Winston-Salem Southbound.

SOURCE: Form APT rendered to I. C. C.

[fol. 477]

Revenue Per Passenger Mile (Cents)—In Parlor and Sleeping Cars
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1937	1938	1939	1940	1941	1942	Average
ACL	2.278	2.433	2.463	2.389	2.460	2.504	2.435
Clinchfield	2.482	3.132	.....	1.011	2.468	3.292	2.504
L & N	2.222	2.354	2.384	2.321	2.309	2.498	2.387
Nor. Sou.	.....	.....	.....	.....	.....	.....	.....
S A L	2.285	2.365	2.351	2.328	2.579	2.810	2.573
Southern	2.328	2.416	2.407	2.353	2.435	2.880	2.555
Average	2.286	2.399	2.405	2.351	2.448	2.694	2.495

SOURCE: Form APT rendered to I. C. C.

[fol. 478]

Revenue (Other Than Commutation) Per Coach Mile (Cents)
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1937	1938	1939	1940	1941	1942	Average
A C L	21.98	18.78	18.47	22.73	31.65	50.34	30.54
Clinchfield	13.62	10.99	9.78	10.72	12.09	20.33	12.98
L & N	20.06	17.10	16.55	17.64	23.55	43.72	24.52
Nor. Sou.	23.19	12.87	10.12	12.51	23.33	68.25	24.90
S A L	31.53	27.23	32.25	23.71	27.05	40.57	23.67
Southern	20.37	19.32	19.14	20.95	29.99	57.89	30.72
Average	22.02	19.51	20.17	23.30	30.93	52.44	30.75

Data for following roads not available:
Aberdeen & Rockfish.
Atlantic & East Carolina.
Carolina & Northwestern.
Danville & Western.
Winston-Salem Southbound.

SOURCE: Form APT rendered to I. C. C.

[fol. 479]

Revenue Per Sleeping and Parlor Car Mile (Cents)
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1937	1938	1939	1940	1941	1942	Average
A C L	21.10	21.47	18.63	19.85	25.15	42.55	25.59
Clinchfield	3.31	112.38		11.03	55.09	82.29	51.31
L & N	18.99	18.79	18.59	18.64	22.80	44.51	25.48
Nor. Sou.							
S A L	20.80	21.79	22.81	22.47	29.52	58.92	32.82
Southern	27.74	26.95	26.52	26.09	32.84	63.15	35.68
Average	22.44	22.48	21.68	21.91	27.79	52.40	29.89

SOURCE: Form APT rendered to I. C. C.

[fol. 480]

Total Railway Tax Accruals (Account 532)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	1936	1937	1938	1939	1940	1941	1942	Average
Aberdeen & Rockfish	$7,911	$9,522	$11,648	$11,890	$31,326	$66,987	$80,240	$31,361
At. & E. Carolina*	26,362	37,819	36,547	23,764	12,784	33,495	82,028	36,114
Atlantic Coast Line	4,465,000	4,825,000	4,625,000	4,390,000	4,550,000	7,650,000	27,900,000	8,343,571
C & N W	35,947	40,172	41,363	51,475	45,380	70,236	84,531	52,729
Clinchfield	725,979	467,920	591,870	699,854	1,004,754	1,240,431	1,497,561	889,767
D & W	16,974	20,922	20,597	24,126	24,475	51,986	28,050	26,733
L & N	6,626,087	7,716,721	7,114,734	8,135,700	10,304,935	18,212,127	48,370,589	15,211,556
Norf. Sou.	333,992	340,752	400,516	389,489	397,518	384,248	1,153,676	485,742
S A L	2,540,337	2,551,930	3,311,956	2,848,110	3,476,947	3,862,311	5,157,733	3,392,760
Sou.	5,892,304	7,069,947	7,369,019	7,814,553	8,391,483	15,552,068	41,488,395	13,368,253
W-Salem Southbound	89,500	79,100	77,300	80,000	90,000	104,000	226,000	106,557
Total	$20,760,388	$23,159,805	$23,600,550	$24,468,961	$28,329,602	$47,227,889	$126,068,803	$41,945,143
Index	100	112	114	118	136	227	607	202

* Transportation property operated, leased from Atlantic & North Carolina R. R. Co.

SOURCE: Reports of the carriers to the Interstate Commerce Commission.

[fol. 481]

Railway Tax Accruals—Passenger

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	1936	1937	1938	1939	1940	1941	1942	Average
A C L	$1,486,801	$1,512,255	$1,555,959	$1,450,077	$1,520,331	$1,513,281	$6,484,242	$2,217,564
Clinch	21,979	26,314	31,575	28,272	28,250	21,862	25,419	26,239
L & N	1,307,787	1,498,428	1,661,076	1,561,801	1,635,869	1,716,511	5,450,546	2,118,860
Nor. Sou.	35,982	31,813	34,273	31,159	35,777	30,740	92,294	41,720
S A L	796,884	764,561	1,011,636	878,760	1,067,405	1,090,559	1,537,924	1,021,104
Southern	1,400,676	1,840,445	1,930,708	1,810,427	1,961,963	1,926,381	8,912,325	2,826,132
Total	5,050,109	5,673,816	6,225,227	5,760,496	6,249,595	6,299,334	22,502,750	8,251,618
Index	100	112	123	114	124	125	446	163

Data for the following roads not available:

Aberdeen and Rockfish.
Atlantic & East Carolina.
Carolina & Northwestern.
Danville and Western.
Winston-Salem Southbound.

SOURCE: Reports of Carriers to the Interstate Commerce Commission.

[fol. 482]

Indices of Hourly Compensation (Cents)—All Employees (1936=100)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1936	1937	1938	1939	1940	1941	1942	Average
Aberdeen & Rockfish	100	103	110	129	148	184	199	146
At. & E. Carolina	100	96	103	108	109	122	140	114
Atlantic Coast Line	100	103	108	112	116	123	134	115
C & N W	100	99	107	109	112	117	130	111
Clinchfield	100	103	110	110	110	116	126	112
Danville & Western	100	99	105	105	107	113	125	108
Louisville & Nashville	100	103	116	109	109	114	124	110
Norfolk Southern	100	100	110	111	114	123	136	113
Seaboard Air Line	100	103	108	109	111	135	132	116
Southern	100	102	110	108	109	115	126	111
Winston-Salem-Southbound	100	107	108	112	116	126	133	114
Average	100	103	109	109	111	119	137	112

SOURCE: Annual Reports to I. C. C.

[fol. 483]

Southern Region

Index of Average Unit Prices of Railway Material and Supplies, Including Fuel
October 1936—100

	Oct. 1, 1936	Jan. 1, 1937	Apr. 1, 1937	Oct. 1, 1937	Dec. 1, 1937	Jan. 1, 1938	Dec. 1, 1938	June 1, 1939	Dec. 1939	June 1940	Dec. 1940	June 1941	Dec. 1941	June 1942	Dec. 1942	June 1943
Forest Products	100	106	110	108	107	102	99	101	111	110	131	132	148	172	182	193
Iron & Steel Prod.	100	108	119	121	122	120	112	112	117	113	114	119	122	123	148	121
Misel. Products	100	108	117	131	105	101	104	101	107	105	105	106	109	115	185	118
Total (excl. Fuel)	100	108	116	115	114	111	107	106	113	110	115	119	124	131	166	136
Fuel (Coal & Oil)	100	103	106	110	112	110	108	109	109	110	110	117	125	127	129	147
Total (incl. Fuel)	100	106	113	114	113	111	107	107	111	110	114	118	124	130	154	140

Source: Records of Association of American Railroads—Bureau of Railway Economics.

[fol. 484]

Revenue Passenger Miles Per Train Mile
Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1916	1917	1918	1919	1920	Average
Aberdeen & Rockfish	*	*	*	20.00	12.17	18.57
At. & E. Carolina	*	*	*	*	*	*
Atlantic Coast Line	46.47	54.02	67.03	69.05	63.64	60.33
Caro. & Northwestern	26.05	34.52	*	47.12	55.63	37.96
Clinchfield	*	43.32	56.43	46.88	48.65	45.44
Danville & Western	42.79	55.12	*	*	75.17	59.96
Louisville & Nashville	52.44	65.12	82.68	80.07	78.77	71.86
Norfolk Southern	40.95	38.48	39.60	55.84	44.87	43.45
Seaboard Air Line	39.47	48.05	73.17	64.35	52.20	55.85
Southern	49.29	66.57	91.19	76.31	68.71	70.66
Winston-Salem S'Bound	27.62	28.75	27.15	30.81	33.67	29.55
Average excluding A&R, A&EC, C&NW, D&W & WSSB	48.06	59.66	79.60	73.17	66.57	65.58

* Not available.

SOURCE: Annual Reports to I. C. C.

[fol. 485]

Revenue Passenger Miles Per Train Mile

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	Average
Aberdeen & Rockfish	10.17	8.99	8.55	5.97	5.36	4.39	3.25	2.66	2.94	2.10	5.55
A & E C	*	*	*	*	*	*	*	*	*	*	*
A C L	51.98	50.79	55.17	52.14	57.28	53.79	40.88	37.97	36.02	33.40	47.14
C & N W	37.04	37.04	35.44	25.30	19.18	15.34	12.62	9.24	7.10	4.51	20.07
Clinchfield	43.89	41.89	47.19	38.16	32.25	28.98	25.82	18.26	16.46	10.99	30.65
D & W	41.94	34.63	25.68	24.83	13.14	7.93	6.37	4.93	3.93	3.44	17.31
L & N	60.43	55.53	62.26	57.22	53.80	50.89	47.71	42.96	39.13	31.09	50.06
Nor. Sou.	56.47	54.44	54.03	48.17	44.06	38.94	29.79	23.99	20.09	11.84	39.22
S A L	40.74	39.22	41.32	38.06	13.80	41.33	33.27	31.61	30.14	23.34	36.43
Southern	58.43	57.21	61.92	57.11	55.55	54.07	49.82	46.58	43.88	34.72	52.09
WS-SB	22.36	23.46	25.77	25.95	30.50	23.88	19.45	14.25	11.58	7.94	21.11
Average excluding A&R, A&EC, C&NW, D&W and WSSB	54.72	52.61	57.19	52.80	53.17	50.68	44.02	40.86	38.24	31.04	47.63
1921–1940											43.42
1916–1940											48.38
1941											75.11
1942											145.85

* Not reported.

[fol. 486]

Revenue Passenger Miles Per Train Mile

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	Average
Aberdeen & Rockfish	1.53	3.48	15.79	8.38	5.85	9.80	6.86	6.65	6.05	11.21	7.56
At. & East Caro.	*	*	*	*	*	13.10	17.74	17.35	18.87	47.75	17.40
Atlantic Coast Line	29.96	25.91	30.25	40.22	42.58	50.08	54.26	47.44	52.20	62.58	43.90
Caro. & Northwestern	3.24	2.32	9.09	12.33	13.37	14.47	11.50	6.38	6.71	6.53	8.55
Clinchfield	7.71	4.19	4.88	13.33	15.63	17.82	17.31	10.96	13.09	14.64	11.82
Danville & Western	5.37	3.44	16.18	22.98	25.41	*	*	*	*	*	14.03
Louisville & Nashville	25.44	23.77	26.60	34.00	38.40	44.29	47.33	35.30	40.67	44.71	35.61
Norfolk Southern	8.92	7.58	15.09	17.72	14.81	16.01	15.21	9.68	9.32	9.81	12.19
Seaboard Air Line	20.33	21.17	26.86	33.18	32.54	39.33	44.96	36.19	53.35	65.13	38.01
Southern	27.75	25.19	28.40	37.20	39.90	45.76	46.59	35.60	44.02	49.56	37.58
W-Salem Southbound x	5.58	2.90	*	*	.....	.....	.....	.....	.....	.....	4.51
Average excl. A&R, A&EC, C&NW, D&W and WSSB	25.83	23.83	27.64	35.85	38.26	44.59	47.53	37.60	46.16	53.75	37.90

x Passenger Service discontinued in 1934. * No Revenue Passenger Miles or Passenger Train Miles Reported.

SOURCE: I. C. C. Statistics of Railways in the United States.

[fol. 487]

Revenue Passenger Miles Per Train Mile

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1941	1942	Jan.-July, 1943
Aberdeen & Rockfish	*	*	*
Atlantic & East Carolina	*	*	*
Atlantic Coast Line	89.35	160.09	219.25
Carolina & Northwestern	6.31	10.86	14.96
Clinchfield	18.07	26.09	41.94
Danville & Western	*	*	*
Louisville & Nashville	60.45	121.76	209.95
Norfolk Southern	11.80	35.01	36.15
Seaboard Air Line	89.19	169.65	237.74
Southern	70.43	145.01	196.19
Winston-Salem Southbound	*	*	*
Average excluding A&R, A&EC, C&NW, D&W and WSSB	75.11	145.85	211.10

* Not reported.

SOURCE: Form OS-D rendered to I. C. C.

[fol. 488]

Revenue Passenger Miles Per Car Mile (Including Mixed and Special)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1916	1917	1918	1919	1920	Average
Aberdeen & Rockfish	5.20	4.96	5.24	6.12	6.09	5.43
At. & East Caro.	*	*	*	*	*	*
Atlantic Coast Line	11.98	14.15	16.63	17.99	16.12	15.46
Caro. & Northwestern	7.95	10.86	*	17.18	18.29	15.37
Clinchfield	13.55	18.09	23.09	19.54	25.93	19.91
Danville & Western	12.91	12.90	*	*	13.72	13.79
Louisville & Nashville	14.19	16.84	20.82	20.59	19.82	18.52
Norfolk Southern	16.09	16.93	17.57	24.93	18.12	18.42
Seaboard Air Line	10.86	13.93	19.52	18.31	15.79	15.83
Southern	14.48	17.35	21.32	18.46	17.22	17.96
Winston-Salem S'Bound	11.16	11.29	11.36	14.12	12.92	12.10
Average excluding A&R, A&EC, C&NW, D&W & WSSB	13.38	16.05	19.93	18.96	17.48	17.29

* Not available.

SOURCE: I. C. C. Statistics of Railways in the United States.

[fol. 489]

Revenue Passenger Miles Per Car Mile (Including Mixed & Special)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Road	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	Average
Aberdeen & Rockfish	7.36	8.99	8.55	5.97	5.36	4.39	3.25	2.66	2.94	2.10	5.36
A & E C	*	*	*	*	*	*	*	*	*	*	*
Atlantic Coast Line	12.88	12.56	12.79	11.91	12.01	11.12	8.68	8.27	19.64	6.76	11.05
Caro. & Northwestern	15.14	16.70	15.59	11.83	9.17	7.49	8.34	6.50	5.75	3.81	10.85
Clinchfield	19.52	18.48	17.20	13.92	11.89	10.75	9.34	6.87	6.15	4.10	11.71
Danville & Western	10.27	8.69	7.51	4.87	3.20	2.62	2.30	1.73	1.34	.86	4.90
Louisville & Nashv.	15.69	14.28	15.41	14.07	12.76	11.86	11.30	10.33	9.34	7.48	12.17
Norfolk Southern	15.66	14.97	14.93	13.08	11.39	10.14	8.21	6.77	5.97	4.77	11.13
Seaboard Air Line	11.78	11.16	11.85	10.54	10.45	9.64	7.63	6.98	6.81	6.01	9.12
Southern	14.41	14.61	14.96	13.57	12.98	12.36	11.60	10.94	10.24	8.20	12.38
W-S S-B	9.70	10.02	11.14	9.47	10.15	9.99	9.41	6.89	5.79	3.97	9.06
Average ex. A&R, A&EC, C&NW, D&W, & WSSB	14.09	13.64	14.20	12.90	12.24	11.45	10.10	9.45	10.26	7.29	11.51

* Operated by Norfolk Southern R. R. Co.

SOURCE: I. C. C. Statistics of Railways in the United States.

[fol. 490]

Revenue Passenger Miles Per Car Mile (Including Mixed and Special)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	Average
Aberdeen & Rockfish	1.53	3.48	15.79	8.38	5.85	9.80	6.86	6.65	6.05	11.21	7.56
At. & East Caro.	*	*	*	*	*	7.85	13.30	13.35	9.48	7.10	9.92
Atlantic Coast Line	6.02	5.41	6.35	8.13	8.59	9.37	9.57	8.09	8.44	10.08	8.16
Caro. & Northwestern	3.05	2.19	7.23	8.61	9.19	11.74	9.70	6.17	6.52	6.34	7.25
Clinchfield	3.79	2.09	2.57	7.53	7.77	8.84	8.58	5.47	6.47	7.25	5.97
Danville & Western	.59	.39	1.68	2.62	2.74	*	*	*	*	*	1.54
Louisville & Nashv.	6.15	5.92	6.70	8.34	9.12	10.07	10.39	8.09	9.17	9.65	8.34
Norfolk Southern	4.28	4.36	7.26	8.03	7.99	10.67	10.35	6.22	7.70	9.59	6.93
Seaboard Air Line	5.47	5.89	7.16	8.94	8.55	10.38	10.99	9.14	11.92	13.84	9.56
Southern	6.69	6.22	7.10	8.91	9.39	11.18	11.07	8.91	10.34	11.10	9.03
WS-Southbound x	2.80	1.71	.....	.....	.....	.....	.....	.....	.....	.....	2.41
Average excl. A&R, A&EC, C&NW, D&W and WSSB	6.19	5.89	6.83	8.58	8.99	10.31	10.49	8.51	9.84	11.00	8.71

x Passenger Service Discontinued in 1934. * No Revenue Passenger Miles or Passenger Car Miles Reported.

SOURCE: I. C. C. Statistics of Railways in the United States.

[fol. 491]

Revenue Passenger Miles Per Car Mile (Including Mixed and Special)

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1941	1942	Jan.–July, 1943
Aberdeen & Rockfish	18.65	17.53	x
Atlantic & East Carolina	7.79	16.26	x
Atlantic Coast Line	13.59	21.90	28.57
Carolina & Northwestern	6.10	9.23	11.98
Clinchfield	8.62	12.37	17.98
Danville & Western	2.36	2.76	3.27
Louisville & Nashville	12.30	21.11	33.17
Norfolk Southern	12.80	21.81	23.63
Seaboard Air Line	16.14	24.20	30.84
Southern	14.25	25.28	31.48
Winston-Salem Southbound	x	x	x
Average excluding A&R, A&EC, C&NW, D&W and WSSB	14.01	23.17	30.95

x Not reported.

SOURCE: Form OS–D rendered to I. C. C.

[fol. 492]

Passenger Miles Per Coach Mile

Railroads Operating in State of North Carolina.
(Petitioners in This Proceeding)

Roads	1937	1938	1939	1940	1941	1942	Average	Jan.-July, 1943
A C L	14.02	10.38	13.24	16.92	23.21	33.32	20.74	42.28
Clinchfield	8.62	5.44	6.47	7.25	8.16	12.29	8.07	14.59
L & N	13.41	9.56	11.79	12.64	16.39	27.71	16.13	45.30
Nor. Sou	14.72	6.21	5.86	7.64	11.38	34.01	13.29	30.53
S A L	21.12	15.21	22.37	27.23	31.00	38.18	28.49	48.95
Southern	14.08	10.59	14.23	16.23	21.07	36.19	20.38	44.68
Average	14.74	10.81	14.46	17.11	22.05	33.62	20.51	44.96

Data for following roads not available:
Aberdeen & Rockfish.
Atlantic & East Carolina.
Carolina & Northwestern.
Danville & Western.
Winston-Salem Southbound.

SOURCE: Form APT rendered to I. C. C.

[fol. 493]

Passenger Miles Per Sleeping and Parlor Car Mile

Railroads Operating in State of North Carolina
(Petitioners in This Proceeding)

Roads	1937	1938	1939	1940	1941	1942	Average	Jan.-July, 1943
A C L	9.26	8.83	7.56	8.31	10.23	16.99	10.51	20.37
Clinchfield	1.33	35.88	...	10.91	22.32	25.00	20.49	...
L & N	8.55	7.98	7.80	8.03	9.87	17.82	10.68	22.99
Nor. Sou x	...	...	...	...	...	...	...	...
S A L	9.10	9.21	9.70	9.65	11.45	21.97	12.75	23.85
Southern	11.92	11.16	11.02	11.09	13.49	21.93	13.96	25.33
Average	9.82	9.37	9.02	9.32	11.36	19.45	11.98	23.06

x Not reported.

SOURCE: APT Reports rendered to I. C. C.

[fol. 494]

EXHIBIT No. 10—Witness: Tassin

Losses, on Annual Basis, December 1, 1942 to November 30, 1943:
(1) Cumulative for States of Alabama, Kentucky, Tennessee and North Carolina
(2) Cumulative for Southern Railway System Lines—All States Served by that System

[fol. 495]

Comparative Statement of Losses

(1) For the 12 month period December 1, 1942 through November 30, 1943 the cumulative loss in the States of Alabama, Kentucky, Tennessee and North Carolina, by reason of failure to permit intrastate at the level of interstate passenger fares and charges amounts to $2,420,035.

(2) Southern Railway System lines serve all states in Southern Region. Were the entire region to revert to the level of intrastate passenger fares and charges presently obtaining in the States of Alabama, Kentucky, Tennessee and North Carolina, cost to Southern Railway System lines, for the twelve month period December 1, 1942 through November 30, 1943, would amount to $1,408,408.

[fol. 496]

Annual Losses (Projected to a Latest Twelve Month Basis), by Reason of Failure to Permit Intrastate at the Level of Interstate Passenger Fares and Charges December 1, 1942 to November 30, 1943

Road	Alabama	Kentucky	Tennessee	North Carolina	Four States
A B & C	$7,800				$7,800
A G S	50,601				50,601
A T & N	16,719				16,719
A C L	30,126			$93,084	123,210
A & E C				4,320	4,320
C & N W				2,640	2,640
C of G	48,951				48,951
C & O		$40,028			40,428
C N O & T P		2,232	13,392		33,624
C C & O			2,124	4,632	6,756
F & W				1	1
G M & O	9,477		552		10,029
IC (Y&MV)	549	25,716	888		27,153
L & N	425,976	424,620	119,772	24	970,392
N C & St.L	234	2,388	242,016		244,638
N S				12,828	12,828
St. L-SF	1,509				1,509
S A L	7,089			76,548	83,637
Southern	124,986	12,816	188,952	381,564	708,318
T A & G	1,185				1,185
T C			#		
W of A	25,296				25,296
Total	$750,498	$526,200	$567,696	$575,641	$2,420,035

Loss not reported account fire.

Source: Audit Departments of the several railroads.

[fols. 497-498]

Estimate of Average Annual Loss (Basis Dec. 1, 1942-Nov. 30, 1943) to Southern Railway System Lines, Assuming Intrastate Passenger Fares and Charges in All States Served Would Be Cut Back to Level Now Obtaining in Alabama, Kentucky, Tennessee and North Carolina

State	Southern	CNO&TP	A G S	N O & N E	G S & F	Total
Virginia	$645,918					$645,918
North Carolina	1,405,656					1,405,656
South Carolina	583,126					583,126
Georgia	870,351		$399		$154,681	1,025,431
Florida	—0—				9,419	9,419
Alabama	688,185		239,411			927,596
Mississippi	8,193		922	$59,707		68,822
Tennessee	648,154	$43,621	3			691,778
Kentucky	48,497	90,244				138,741
Indiana	55,876					55,876
Illinois	29,474					29,474
Ohio		—0—				—0—
Louisiana				51,793		51,793
Total	$4,983,430	$133,865	$240,735	$111,500	$164,100	$5,633,630
System Loss estimated at 25%						$1,408,408

Southern Railway System Lines

	Southern	CNO&TP	A G S	Total
Alabama	$124,986		$50,601	$175,587
Kentucky	12,816	$20,232		33,048
Tennessee	188,952	13,392		202,344
North Carolina	381,564			381,564
Total	$708,318	$33,624	$50,601	$792,543
Added to as above:				
Alabama	$688,185		$239,411	$927,596
Kentucky	48,497	$90,244		138,741
Tennessee	648,154	43,621	3	691,778
North Carolina	7,405,656			1,405,656
Total	$2,790,492	$133,865	$239,414	$3,163,771
Grand Total	$3,498,810	$167,489	$290,015	$3,956,314
Ratio of Loss	25%	25%	21%	25%

[fol. 499] EXHIBIT No. 11—Witness: Tassin

[fol. 500]

Freight and Passenger Gross Revenues Increases Current Over Prior Period Dec. 1942-Oct. 1943 v. Dec. 1941-Oct. 1942

Representative Peak Month

For passenger revenues, for 5 out of 16 roads, December 1942 over 1941, was the month of greatest increase in percentage points; weighted in proportion to such greatest common experience, however, the peak month of percentage increase was January.

In considering January to October increases over preceding December, however, August was the peak month of greatest common experience in 1943 as compared with October in 1942. When it comes to weighted common experience, we have August in 1943 as compared with September in 1942—a slowing up in both instances for the current as compared with the prior year.

In the case of freight revenues, for 9 out of 16 roads, February 1943 over 1942 was the month of greatest increase in percentage points and that was likewise the weighted common experience.

In considering January to October, increase over preceding December, in 1943 March was the month of greatest and June of weighted common experience, as compared with October for both greatest and weighted common experience—showing the current lagging well behind the prior period.

Greatest and Weighted Common Percents of Increase

For freight revenues 2% was the greatest and 14% the weighted common experience. Increase over December 1942 was 1% for greatest and 3% for weighted common experience. For 1942 over December 1941 19% was greatest and 23% weighted common experience.

For passenger revenues, 63% was greatest and 97% weighted common experience. 1943 v. December 1942 greatest was 2% off and weighted 13% over. For 1942 v. December 1941 greatest was 1% off and weighted 50% over.

[fol. 501]

Increases Current Over Prior Period Dec. 1942-Oct. 1943 v. Dec. 1941-Oct. 1942
Number of Months Before and After Peak Month

Road	Freight Revenues			Passenger Revenues		
	Before	Peak	After	Before	Peak	After
A G S	–	Dec.	10	3	March	7
A B & C	3	March	7	6	June	4
A C L	–	Dec.	10	–	Dec.	10
C of Ga.	2	Feb.	8	5	May	5
C & O	2	Feb.	8	–	Dec.	10
C N O & T P	1	Jan.	9	1	Jan.	9
Clinch.	3	March	7	4	April	6
G' & O	2	Feb.	8	1	Jan.	9
IC & MV	–	Dec.	10	7	July	3
L & N	2	Feb.	8	2	Feb.	8
NC & St.L.	2	Feb.	8	3	March	7
Nor. Sou.	2	Feb.	8	1	Jan.	9
St.L-SF	2	Feb.	8	–	Dec.	10
S A L	2	Feb.	8	–	Dec.	10
Southern	2	Feb.	8	3	March	7
W of A	1	Jan.	9	–	Dec.	10
16 Roads	2	Feb.	8	1	Jan.	9

Freight Revenues

	Jan.-Oct., 1943 v. Dec., 1942			Jan.-Oct., 1942 v. Dec. 1941		
A G S	4	May	5	8	Sept.	1
A B & C	2	March	7	9	Oct.	–
A C L	2	March	7	4	May	5
C of Ga.	2	March	7	9	Oct.	–
C & O	6	July	3	9	Oct.	–
CNO&TP	4	May	5	8	Sept.	1
Clinch	2	March	7	9	Oct.	–
G M & O	3	April	6	9	Oct.	–
IC-Y&MV	4	May	5	9	Oct.	–
L & N	9	Oct.	–	9	Oct.	–
NC&St.L	9	Oct.	–	9	Oct.	–
Nor. Sou.	9	Oct.	–	5	June	4
St.L-SF	9	Oct.	–	9	Oct.	–
S A L	2	March	7	9	Oct.	–
Southern	2	March	7	9	Oct.	–
W of A	9	Oct.	–	9	Oct.	–
16 Roads	5	June	4	9	Oct.	–

Passenger Revenues

	Jan.-Oct., 1943 v. Dec. 1942			Jan.-Oct., 1942 v. Dec. 1941		
A G S	8	Sept.	1	7	Aug.	2
A B & C	2	March	7	7	Aug.	2
A C L	7	Aug.	2	8	Sept.	1
C of Ga.	7	Aug.	2	9	Oct.	–
C & O	9	Oct.	–	9	Oct.	–
CNO&TP	9	Oct.	–	7	Aug.	2
Clinch	5	June	4	9	Oct.	–
G M & O	7	Aug.	2	7	Aug.	2
IC-Y&MV	8	Sept.	1	8	Sept.	1
L&N	7	Aug.	2	8	Sept.	1
NC&St.L	5	June	4	9	Oct.	–
Nor. Sou.	7	Aug.	2	8	Sept.	1
St.L-SF	5	June	4	9	Oct.	–
S A L	8	Sept.	1	7	Aug.	2
Southern	7	Aug.	2	9	Oct.	–
W of A	7	Aug.	2	8	Sept.	1
16 Roads	7	Aug.	2	8	Sept.	1

Comparison of Increases or Decreases
Current Over Preceding Period
Dec. 1942—Oct. 1943 v. Dec. 1941—Oct. 1942
and
Ratio Each Succeeding Month to Month of December

1. Road
2. Freight revenues, current v. preceding period.
3. Ratio relation, Jan.–Oct. 1943 v. Dec. 1942.
4. Ratio relation, Jan.–Oct. 1942 v. Dec. 1941.
5. Passenger revenues, current v. preceding period.
6. Ratio relation, Jan.–Oct. 1943 v. Dec. 1942.
7. Ratio relation, Jan.–Oct. 1942 v. Dec. 1941.

1.	2.		3.		4.		5.		6.		7.	
	GCE	WCE	GCE	WCE	GCE	WCE	GCE	WCE	GCE	WCE	GCE	WCE
A G S	0	17	104	106	106	146	...	90	...	120	...	146
A B & C	...	31	...	100	...	128	...	63	103	113	...	126
A C L	...	40	82	94	...	139	...	87	...	116	...	167
C of Ga	...	24	...	100	...	101	...	89	134	140	...	164
C & O	8	11	...	115	...	121	...	129	...	109	...	170
CNO&TP	8	16	105	107	131	126	...	112	...	86	...	144
Clinch	2	3	96	98	97	98	...	129	...	120	...	132
G M & O	52	7	...	104	...	133	...	150	...	136	...	131
IC Y&MV	17	16	97	99	...	131	...	82	117	115	...	121
L&N	6	15	102	100	125	121	...	131	141	128	...	175
NC&St.L	23	38	102	102	...	128	...	136	98	118	...	158
Nor. Sou	2	8	107	120	...	120	...	87	...	114	130	155
St. L SF	18	20	111	108	...	121	...	112	...	112	...	158
S A L	...	26	...	95	...	125	...	71	113	112	169	179
Southern	...	15	108	105	130	123	...	96	124	112	248	187
W of A	7	15	113	113	...	137	...	99	...	84	118	186
16 Roads	2	14	101	103	119	123	68	97	98	113	99	150

[fol. 503]

(1) The Alabama Great Southern Railroad Company
Monthly Comparison of Railway Operating Revenues & Expenses
December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$1,373,689	$837,043	64.11	$343,094	$160,421	113.87
	1943	1942		1943	1942	
January	$1,430,599	$884,597	61.72	$318,133	$151,368	110.17
February	1,271,235	888,342	43.10	296,118	144,670	104.69
March	1,457,191	1,168,247	24.73	406,565	141,926	186.46
April	1,369,492	1,304,605	4.97	420,634	182,219	130.84
May	1,586,533	1,345,251	17.94	388,409	271,769	42.92
June	1,521,315	1,425,830	6.70	384,877	232,677	65.41
July	1,486,718	1,485,030	.11	409,600	243,702	67.83
August	1,429,684	1,427,870	.13	471,129	352,653	33.60
September	1,512,823	1,504,865	.53	541,307	294,758	83.64
October	1,498,223	1,464,575	2.30	467,870	322,254	45.19

Rate of Increase or Decrease
(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	104	106	93	94
February	93	106	86	90
March	106	140	118	88
April	100	156	123	114
May	115	161	113	169
June	111	170	112	145
July	108	177	119	152
August	104	171	137	220
September	110	180	158	184
October	109	175	136	201

[fol. 504]

(2) Atlanta, Birmingham & Coast R. R. Company
Monthly Comparison of Railway Operating Revenues and Expenses
December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$521,500	$332,711	56.74	$47,655	$27,214	75.11
	1943	1942		1943	1942	
January	$548,355	$367,057	49.39	$56,188	$34,400	63.34
February	483,107	291,792	65.57	57,049	32,694	74.49
March	605,054	359,598	68.26	65,200	40,993	59.05
April	575,760	370,969	55.20	60,929	34,514	76.53
May	583,093	422,235	38.10	44,603	26,029	71.36
June	481,685	408,874	17.81	48,970	24,703	98.24
July	450,320	495,813	D 9.18	53,201	34,123	55.91
August	552,745	511,109	8.15	63,226	42,529	48.67
September	454,446	502,373	D 9.54	48,617	34,746	39.92
October	468,207	543,750	D13.89	49,043	38,043	28.91

Rate of Increase or Decrease
(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	105	110	118	126
February	93	88	120	120
March	116	108	137	151
April	110	111	128	127
May	112	127	94	96
June	92	123	103	91
July	86	149	112	125
August	106	154	133	156
September	87	151	102	128
October	90	163	103	140

D-Denotes Decrease.

[fol. 505]

(3) Atlantic Coast Line Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$8,942,133	$4,671,919	91.40	$3,010,112	$1,188,513	153.27
	1943	1942		1943	1942	
January	$9,173,173	$4,865,712	88.53	$2,973,657	$1,344,417	121.19
February	8,924,284	5,246,941	70.09	3,076,202	1,590,361	93[illegible]
March	10,470,732	6,572,040	59.32	3,308,172	1,872,964	76.63
April	9,658,354	6,885,041	40.28	3,792,747	2,164,080	75.26
May	9,336,330	7,478,940	24.83	3,839,138	1,769,869	116.92
June	8,416,382	7,038,297	19.58	3,820,892	1,930,925	97.88
July	7,495,779	6,330,298	18.41	3,658,766	2,050,750	78.41
August	7,691,221	6,799,913	13.11	3,898,296	2,177,809	79.00
September	7,358,055	6,542,750	12.46	3,355,325	2,472,469	35.71
October	7,320,603	7,382,214	D .83	3,291,153	2,508,747	31.19

Rate of Increase or Decrease

(Month of December—Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	103	104	99	113
February	100	112	102	134
March	117	141	110	158
April	108	147	126	182
May	104	160	128	149
June	94	151	127	162
July	84	135	122	173
August	86	146	130	183
September	82	140	111	208
October	82	158	109	211

D—Denotes Decrease.

[fol. 506]

(4) Central of Georgia Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942.

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$2,216,337	$1,804,275	22.84	$462,225	$221,107	109.05
	1943	1942		1943	1942	
January	$2,010,598	$1,471,811	36.61	$511,442	$218,838	133.71
February	2,117,856	1,425,147	48.61	490,525	271,150	80.91
March	2,470,286	1,673,138	47.64	615,750	306,340	101.00
April	2,415,432	1,697,374	42.30	620,906	300,557	106.59
May	2,191,102	1,790,354	22.38	720,069	304,631	136.37
June	2,116,041	1,909,582	10.81	686,690	405,210	69.47
July	2,067,269	2,056,505	.52	663,759	368,534	80.11
August	2,331,516	1,834,463	27.10	842,161	459,270	83.37
September	2,274,817	1,974,244	15.22	621,376	451,839	37.52
October	2,163,954	2,365,849	D 8.53	773,344	541,764	42.75

Rate of Increase or Decrease

(Month of December—Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	91	82	111	99
February	96	79	106	123
March	111	93	133	139
April	109	94	134	136
May	99	99	156	138
June	95	106	149	183
July	93	114	144	167
August	105	102	182	208
September	103	109	134	204
October	98	131	167	245

D—Denotes Decrease.

[fol. [507]

(5) Chesapeake & Ohio Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 121)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$13,049,334	$11,256,699	15.93	$1,630,612	$505,408	222.63
	1943	1942		1943	1942	
January	$13,638,661	$11,193,826	21.84	$1,602,732	$549,884	191.47
February	13,491,501	9,810,529	37.52	1,329,553	433,707	203.06
March	16,048,171	12,257,712	30.92	1,364,609	529,033	157.94
April	15,218,361	14,081,565	8.07	1,466,317	703,359	108.47
May	14,870,720	15,197,594	D 2.15	1,634,509	820,626	99.18
June	12,100,156	14,824,076	D18.37	1,736,796	938,531	85.05
July	16,443,624	14,340,132	14.67	2,051,032	1,010,603	102.95
August	16,131,510	14,971,607	7.75	2,417,820	1,094,099	120.99
September	15,560,582	14,357,636	8.38	2,063,074	1,227,811	68.03
October	15,924,151	15,646,936	1.77	2,118,493	1,297,080	63.33

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	105	99	98	109
February	103	87	82	87
March	123	109	84	105
April	117	125	90	139
May	114	135	100	162
June	93	132	106	186
July	126	127	126	200
August	124	133	148	216
September	119	128	127	243
October	122	139	130	257

D—Denotes Decrease.

[fol. 508]

(6) The Cincinnati, New Orleans & Texas Pacific Ry. Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$2,207,962	$1,665,162	32.60	$641,745	$212,309	202.27
	1943	1942		1943	1942	
January	$2,454,025	$1,666,717	47.24	$369,127	$202,602	82.19
February	2,155,893	1,582,300	36.25	525,558	301,000	74.60
March	2,498,754	2,024,920	23.40	645,936	228,064	183.23
April	2,319,114	2,139,773	8.38	557,968	194,421	186.99
May	2,504,670	2,111,501	18.62	482,735	307,945	56.76
June	2,316,702	2,130,731	8.73	506,616	219,472	130.83
July	2,332,459	2,224,782	4.84	573,264	351,221	63.22
August	2,352,180	2,225,249	5.70	551,119	475,723	15.85
September	2,210,241	2,308,183	D 4.24	609,147	353,857	72.14
October	2,314,880	2,134,371	8.45	657,912	427,084	54.05

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	111	100	58	95
February	98	95	82	142
March	113	122	101	107
April	105	129	87	92
May	113	127	75	145
June	105	128	79	103
July	106	134	89	165
August	107	134	86	224
September	100	139	95	167
October	105	128	103	201

D—Denotes Decrease.

[fol. 509]

(7) Clinchfield Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$1,058,131	$1,030,458	2.69	$11,683	$5,080	129.98
	1943	1942		1943	1942	
January	$1,083,194	$999,463	8.38	$10,513	$4,295	144.77
February	1,016,403	908,720	11.85	9,402	3,787	148.27
March	1,225,766	971,223	26.21	11,004	4,402	149.98
April	1,109,659	997,846	11.21	17,958	5,131	49.99
May	1,035,398	1,058,252	D 2.16	18,981	5,608	238.46
June	933,621	1,015,849	D 8.09	19,668	7,130	175.85
July	1,015,733	1,000,482	1.52	16,653	8,685	91.74
August	1,061,451	1,043,085	1.76	14,801	9,613	53.97
September	987,906	1,049,571	D 5.88	10,413	8,240	26.37
October	965,045	1,060,240	D 8.98	10,908	10,000	9.08

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	102	97	90	85
February	96	88	80	75
March	116	94	94	87
April	105	97	154	101
May	98	103	162	110
June	88	99	168	140
July	96	97	143	171
August	100	101	127	189
September	93	102	89	162
October	91	103	93	197

D—Denotes Decrease.

[fol. 510]

(8) Gulf, Mobile and Ohio Railroad

Monthly Comparison of Railway Operating Revenues & Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1942	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$2,731,487	$1,879,501	45.33	$168,744	$79,741	111.62
	1943	1942		1943	1942	
January	$2,920,483	$1,927,455	51.32	$182,765	$50,915	258.96
February	2,866,594	1,882,673	52.26	169,259	49,532	241.72
March	3,135,455	2,064,465	51.88	206,800	77,343	167.38
April	3,231,167	2,428,138	33.07	252,966	78,298	223.08
May	2,730,381	2,656,219	2.79	247,415	117,174	111.15
June	2,554,310	2,540,097	0.56	223,305	93,249	139.47
July	2,755,837	2,701,295	2.02	262,624	90,540	190.06
August	2,817,872	2,958,034	D 4.74	271,146	114,471	136.87
September	2,682,839	2,750,776	D 2.47	250,493	188,274	33.05
October	2,704,021	3,159,957	D14.43	232,085	172,349	34.66

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	107	103	108	64
February	105	100	100	62
March	115	110	123	97
April	118	129	150	98
May	100	141	147	147
June	94	135	132	117
July	101	144	156	114
August	103	157	161	144
September	98	146	148	236
October	99	168	138	216

D—Denotes Decrease.

[fol. 511]

(9) Illinois Central Railroad Co. (Incl. Y&MV)

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$16,437,433	$11,254,197	46.06	$2,764,110	$1,442,949	91.56
	1943	1942		1943	1942	
January	$16,607,539	$11,804,439	40.69	$2,709,791	$1,388,152	95.20
February	15,763,241	12,072,485	30.57	2,519,739	1,396,663	80.41
March	17,433,926	13,717,503	27.09	2,714,818	1,459,480	86.01
April	15,871,845	13,580,433	16.87	2,752,731	1,494,296	84.22
May	17,972,897	15,329,595	17.24	2,957,234	1,597,738	85.09
June	15,994,831	14,776,642	8.24	3,221,802	1,664,511	93.56
July	15,729,718	15,830,443	D 0.64	3,608,940	1,828,512	97.37
August	16,261,469	15,978,661	1.77	3,768,690	2,101,845	79.30
September	15,864,494	16,315,786	D 2.77	3,754,737	2,278,791	64.77
October	16,405,382	17,831,278	D 8.00	3,227,902	2,208,386	46.17

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	101	105	98	96
February	96	107	91	97
March	106	122	98	101
April	97	121	100	104
May	109	136	107	111
June	97	131	117	115
July	96	141	131	127
August	99	142	136	146
September	97	145	136	158
October	100	158	117	153

D—Denotes Decrease.

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(10) Louisville & Nashville Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$12,656,341	$9,314,690	35.88	$2,852,517	$1,033,127	176.11
	1943	1942		1943	1942	
January	$12,209,696	$9,237,378	32.18	$2,811,306	$1,105,888	154.21
February	11,960,821	8,755,802	36.60	3,373,114	1,067,832	215.88
March	13,360,199	10,211,014	30.84	4,029,249	1,299,697	210.01
April	12,960,409	11,500,624	12.69	4,025,713	1,495,603	169.17
May	12,864,427	11,680,044	10.14	3,820,120	1,622,942	135.38
June	12,204,943	12,049,878	1.29	3,955,136	1,826,803	116.51
July	12,554,929	11,615,668	8.09	4,027,690	2,160,756	86.40
August	12,755,632	12,064,065	5.73	4,078,982	2,391,114	70.59
September	12,619,436	11,932,966	5.75	3,916,954	2,583,657	51.61
October	12,943,672	12,697,760	1.94	3,864,941	2,493,478	55.00

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	96	99	99	107
February	95	94	118	103
March	106	110	141	126
April	102	123	141	145
May	102	125	134	157
June	96	129	139	177
July	99	125	141	209
August	101	130	143	231
September	100	128	137	250
October	102	136	135	241

[fol. 513]

(11) Nashville, Chattanooga & St. Louis Railway Company

Monthly Comparison of Railway Operating Revenues & Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$2,490,220	$1,489,922	67.14	$591,497	$214,188	176.16
	1943	1942		1943	1942	
January	$2,391,698	$1,441,361	65.93	$580,457	$220,207	163.60
February	2,288,013	1,361,028	68.11	512,447	201,161	154.74
March	2,529,176	1,592,020	58.87	732,426	217,294	237.07
April	2,455,715	1,648,021	49.01	583,567	217,485	168.33
May	2,592,484	1,826,352	41.95	577,053	244,597	135.92
June	2,478,488	2,019,982	22.70	943,410	334,676	181.89
July	2,545,147	2,075,357	22.64	777,502	388,989	99.8
August	2,626,508	2,034,852	29.08	954,069	490,523	94.50
September	2,540,010	2,376,620	6.87	786,918	533,910	47.39
October	2,879,820	2,588,738	11.24	758,120	537,330	41.09

Rate of Increase or Decrease

(Month of December = Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	96	97	98	103
February	92	91	87	94
March	102	107	124	101
April	99	111	99	102
May	104	123	98	114
June	100	136	159	156
July	102	139	131	182
August	105	137	161	229
September	102	160	133	249
October	116	174	128	251

[fol. 514]

(12) Norfolk Southern R. R. Company

Monthly Comparison of Railway Operating Revenues & Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$535,258	$512,567	4.43	$24,396	$12,026	102.86
	1943	1942		1943	1942	
January	$575,286	$448,008	28.41	$26,269	$5,907	344.71
February	592,095	449,608	31.69	19,356	7,300	165.15
March	682,267	524,879	29.99	27,284	10,259	165.95
April	601,283	549,618	9.40	24,531	15,681	56.44
May	644,854	632,064	2.02	20,519	16,612	31.43
June	737,731	833,845	D11.53	29,964	21,062	42.27
July	735,649	720,827	2.06	32,958	29,432	11.98
August	571,820	627,432	D 8.86	40,039	30,917	29.50
September	609,715	707,087	D13.77	23,780	31,004	D23.30
October	818,744	668,330	22.51	33,223	25,895	28.30

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	107	87	108	49
February	111	88	79	61
March	127	102	112	85
April	112	107	101	130
May	120	123	84	130
June	138	163	123	175
July	137	141	135	245
August	107	122	164	257
September	114	138	97	258
October	153	130	136	215

D—Denotes Decrease.

[fol. 515]

(13) St. Louis-San Francisco Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$5,966,012	$4,457,853	33.83	$1,699,442	$621,882	173.27
	1943	1942		1943	1942	
January	$5,559,174	$4,372,404	27.14	$1,674,167	$622,659	168.87
February	5,831,161	4,069,351	43.29	1,584,482	603,506	162.53
March	6,683,813	4,860,006	37.53	1,799,872	731,763	145.96
April	6,235,767	4,945,184	26.10	1,771,377	790,786	124.00
May	5,756,207	5,124,821	12.32	1,503,291	880,889	70.66
June	6,542,540	5,544,699	18.00	2,203,798	963,157	128.81
July	6,665,086	5,638,340	18.21	2,101,252	1,220,344	72.19
August	6,548,775	6,027,367	8.65	2,372,139	1,226,702	93.38
September	6,431,144	6,432,896	D 0.03	1,972,961	1,286,144	53.40
October	7,256,750	7,084,229	2.44	2,082,838	1,499,068	38.94

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	93	98	99	100
February	98	91	93	97
March	112	109	106	118
April	105	111	104	127
May	96	115	88	142
June	110	124	130	155
July	112	126	124	196
August	110	135	140	197
September	108	144	116	207
October	122	159	123	241

D—Denotes Decrease.

[fol. 516]

(14) Seaboard Air Line Railway

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$7,748,924	$4,912,672	57.73	$3,002,095	$1,182,787	153.82
	1943	1942		1943	1942	
January	$7,688,752	$4,807,800	59.92	$3,111,908	$1,451,429	114.40
February	7,591,516	4,691,712	61.81	3,186,316	1,658,619	92.11
March	8,709,590	5,626,464	54.80	3,529,813	2,003,464	76.19
April	7,974,418	6,083,733	31.08	3,606,621	1,822,889	97.85
May	8,178,102	6,667,585	22.65	3,194,333	2,004,572	59.35
June	7,456,234	6,740,734	10.61	3,286,436	2,008,910	63.59
July	6,290,594	6,502,790	D 3.26	3,063,687	2,112,887	45.00
August	6,422,531	6,563,123	D 2.14	3,517,624	2,927,237	20.17
Septem	6,084,449	6,527,654	D 6.79	3,610,161	2,752,156	31.18
October	6,965,612	7,040,451	D 1.06	3,247,789	2,607,995	24.53

Rate of Increase or Decrease

(Month of December—Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	99	98	104	123
February	98	95	106	140
March	112	115	118	169
April	103	124	120	154
May	106	136	106	169
June	96	137	109	170
July	81	132	102	179
August	83	134	117	247
September	79	133	120	233
October	90	143	108	220

D—Denotes decrease.

[fol. 517]

(15) Southern Railway Company

Monthly Comparison of Railway Operating Revenues & Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$13,819,464	$10,521,848	31.34	$4,340,949	$1,598,902	171.50
	1943	1942		1943	1942	
January	$14,309,917	$10,712,215	33.59	$3,882,144	$1,558,116	149.16
February	13,682,669	10,001,142	36.81	3,826,290	1,759,907	117.41
March	15,197,830	11,923,281	27.46	4,687,097	1,618,105	189.67
April	14,903,036	12,554,549	18.71	4,262,373	1,875,018	127.32
May	14,996,283	13,281,683	12.91	5,374,011	2,907,847	84.81
June	13,272,939	13,373,670	D .75	5,193,754	3,143,655	65.21
July	13,879,272	13,633,610	1.80	565,088	3,350,835	60.11
August	14,171,389	13,720,985	3.28	5,547,313	3,972,701	39.64
September	14,963,099	14,301,925	4.62	4,665,855	3,749,290	24.45
October	14,474,265	14,891,374	D 2.80	4,974,209	3,969,102	25.32

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	104	102	89	97
February	99	95	88	110
March	110	113	108	101
April	108	119	98	117
May	109	126	124	182
June	96	127	120	197
July	100	130	124	210
August	103	130	128	248
September	108	136	107	234
October	105	142	115	248

D—Denotes Decrease.

[fol. 518]

(16) Western Railway of Alabama

Monthly Comparison of Railway Operating Revenues & Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Frt. Rev. (Accts. 101 & 121)			Pass. Rev. (Accts. 102 & 122)		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$237,146	$172,100	37.80	$168,738	$42,271	299.18
	1943	1942		1943	1942	
January	$275,017	$175,534	56.67	$126,033	$49,867	152.74
February	250,587	173,735	44.24	98,256	49,945	96.73
March	317,250	224,660	41.21	119,516	60,975	96.01
April	257,840	241,493	6.77	136,306	61,375	122.09
May	267,956	247,112	8.44	135,406	74,468	81.83
June	260,269	230,730	12.80	150,344	97,602	54.04
July	267,411	249,900	7.01	172,322	96,049	79.41
August	264,292	273,383	D 3.33	175,465	107,834	62.72
September	232,000	269,334	D13.86	154,644	122,102	26.65
October	277,290	278,609	D .47	147,850	121,594	21.59

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	116	102	75	118
February	106	101	58	118
March	134	131	71	144
April	109	140	81	145
May	113	144	80	176
June	110	134	89	231
July	113	145	102	227
August	111	159	104	255
September	98	156	92	289
October	117	162	88	288

D—Denotes Decrease.

[fol. 519] EXHIBIT No. 12—Witness: Tassin

[fol. 520]

Total Revenues and Expenses

Increases Current Over Prior Period

Dec. 1942-Oct. 1943 v. Dec. 1941-Oct. 1942

Representative Peak Month

In the case of revenues, for 7 out of 16 roads, February 1943 over 1942 was the month of greatest increase in percentage points; weighted in proportion to such greatest common experience, however, the peak month of percentage increase was January.

In considering January to October increases over preceding December, for 1943, March was the month of greatest and April of weighted common experience; for 1942 October was both greatest and weighted common experience.

In the case of expenses, October was the month of greatest and September of weighted common experience in percentage points of increase.

In considering January to October increases over preceding December, in 1943 March was the month of greatest and April of weighted common experience; in 1942 October was the month of greatest and weighted common experience alike.

Greatest and Weighted Common Experience with Respect to Percentage Increases in Revenues and Expenses

With respect to revenues, 13% was greatest and 25% weighted common experience. 1943 over December 1942 1% was greatest and 4% weighted common experience. For 1942 v. December 1941 greatest was 1% off and weighted 23% over.

With respect to expense, 24% was greatest and 21% weighted common experience. 1943 over Dec. 1942 9% was greatest and 8% weighted common experience. For 1942 over Dec. 1941, 1% was greatest and 7% weighted common experience.

[fol. 521]

Increases Current Over Prior Period

Dec. 1942-Oct. 1943 v. Dec. 1941-Oct., 1942

Number of Months Before & After Peak Month

Road	Total Revenues			Total Expenses		
	Before	Peak	After	Before	Peak	After
A G S	–	Dec.	10	–	Dec.	10
A B & C	2	Feb.	8	–	Dec.	10
A C L	–	Dec.	10	5	May	5
C of Ga	3	March	7	5	May	5
C & O	2	Feb.	8	10	Oct.	–
CNO&TP	–	Dec.	10	1	Jan.	9
Clinch	3	March	7	3	March	7
G M & O	1	Jan.	9	2	Feb.	8
IC-Y&MV	–	Dec.	10	–	Dec.	10
L & N	2	Feb.	8	3	March	7
NC&St.L	2	Feb.	8	8	August	2
Nor. Sou	2	Feb.	8	3	March	7
St.L-SF	2	Feb.	8	10	Oct.	–
S A L	–	Dec.	10	–	Dec.	10
Southern	2	Feb.	8	1	Jan.	9
W of A	–	Dec.	10	2	Feb.	8
16 Roads	1	Jan.	9	3	March	7

Total Revenue

	Jan.-Oct. 1943 v. Dec. 1942			Jan.-Oct. 1942 v. Dec. 1941		
A G S	8	Sept.	1	8	Sept.	1
A B & C	2	March	7	9	Oct.	–
A C L	2	March	7	9	Oct.	–
C of Ga.	7	Aug.	2	9	Oct.	–
C & O	7	Aug.	2	9	Oct.	–
CNO&TP	2	March	7	7	Aug.	2
Clinch	2	March	7	9	Oct.	–
G M & O	3	April	6	9	Oct.	–
IC-Y&MV	4	May	5	9	Oct.	–
L&N	2	March	7	9	Oct.	–
NC&St.L	9	Oct.	–	9	Oct.	–
Nor. Sou.	9	Oct.	–	5	June	4
St.L-SF	9	Oct.	–	9	Oct.	–
S A L	2	March	7	9	Oct.	–
Southern	4	May	5	9	Oct.	–
W of A	2	March	7	9	Oct.	–
16 Roads	3	April	6	9	Oct.	–

Total Expense

	Jan.-Oct. 1943 v. Dec. 1942			Jan.-Oct. 1942 v. Dec. 1941		
A G S	8	Sept.	1	9	Oct.	–
A B & C	9	Oct.	–	9	Oct.	–
A C L	4	May	5	9	Oct.	–
C of Ga.	4	May	5	9	Oct.	–
C & O	9	Oct.	–	9	Oct.	–
CNO&TP	9	Oct.	–	6	July	3
Clinch	9	Oct.	–	4	May	5
G M & O	4	May	5	9	Oct.	–
IC-Y&MV	4	May	5	9	Oct.	–
L&N	8	Sept.	1	9	Oct.	–
NC&St.L	8	Sept.	1	9	Oct.	–
Nor. Sou.	6	July	3	8	Sept.	1
St. L-SF	9	Oct.	–	9	Oct.	–
S A L	2	March	7	9	Oct.	–
Southern	9	Oct.	–	9	Oct.	–
W of A	9	Oct.	–	8	Sept.	1
16 Roads	8	Sept.	1	9	Oct.	–

[fol. 522]

Comparison of Increases or Decreases

Current Over Preceding Period

Dec. 1942–Oct. 1943 v. Dec. 1941–Oct. 1942

and

Ratio Each Succeeding Month to Month of December

1. Road.
2. Total revenues, current v. preceding period.
3. Ratio relation, Jan.–Oct. 1943 v. Dec. 1942.
4. Ratio relation, Jan.–Oct. 1942 v. Dec. 1941.
5. Total expenses, current v. preceding period.
6. Ratio relation, Jan.–Oct. 1943 v. Dec. 1942.
7. Ratio relation, Jan.–Oct. 1942 v. Dec. 1941.

1.	2.		3.		4.		5.		6.		7.	
	GCE	WCE	GCE	WCE	GCE	WCE	GCE	WCE	GCE	WCE	GCE	WCE
A G S	...	30	109	108	...	150	...	26	...	110	...	140
A B & C	...	30	92	99	108	121	...	35	56	58	106	105
A C L	...	49	101	101	149	150	28	27	111	111	111	110
C of Ga.	...	35	110	108	98	103	18	19	110	109	103	103
C&O	...	18	...	114	137	126	15	15	114	111	111	110
CNO&TP	50	30	101	101	128	125	16	16	130	129	129	128
Clinch.	2	4	96	98	97	98	19	18	117	116	100	100
GM&O	55	28	103	105	141	134	23	19	97	97	89	91
IC-Y&MV	33	25	100	101	119	127	28	28	81	80	114	116
L & N	...	11	108	106	132	126	22	20	109	107	104	108
NC&St.L	77	56	...	106	...	129	33	35	143	128	116	122
Nor. Sou.	33	13	...	121	87	123	20	18	119	117	135	123
St. L-SF	...	33	111	106	...	124	31	28	117	116	101	95
SAL	9	33	99	99	...	132	26	24	84	83	105	106
SOU	48	31	105	105	...	127	18	14	114	113	108	106
W of A	23	33	94	99	104	141	24	24	114	114	...	97
16 Roads	13	25	101	104	99	123	24	21	109	108	101	107

Note: In considering expense comparisons, current v. preceding period, probability of heavy wage adjustments with retroactive features must be borne in mind. Such and other conditions will likewise affect the necessary amount of tax accruals, hence no attempt is here made to anticipate accrual of net railway operating income.

[fol. 523]

(1) The Alabama Great Southern Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$1,821,449	$1,067,254	70.67	$906,715	$581,569	55.91
	1943	1942		1943	1942	
January	$1,840,026	$1,103,790	66.70	$1,011,860	$688,979	46.86
February	1,647,125	1,088,363	51.34	876,526	680,622	28.78
March	1,957,854	1,389,467	40.91	965,483	758,325	27.32
April	1,882,433	1,559,257	20.73	870,186	803,421	8.31
May	2,067,366	1,689,651	22.35	1,048,498	791,788	32.42
June	2,005,273	1,727,215	16.10	1,002,901	827,382	21.21
July	1,976,806	1,800,396	9.80	1,058,077	853,143	24.02
August	1,992,566	1,855,960	7.36	987,423	900,292	9.68
September	2,137,890	1,885,645	13.38	1,067,191	888,625	20.09
October	2,050,582	1,875,488	9.34	1,044,926	938,913	11.29

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	101	103	112	118
February	90	102	97	117
March	107	130	106	130
April	103	146	96	138
May	114	158	116	136
June	110	162	111	142
July	109	169	117	147
August	109	174	109	155
September	117	177	118	153
October	113	176	115	161

[fol. 524]

(2) Atlanta, Birmingham & Coast Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$592,595	$392,567	50.95	$711,268	$341,398	108.34
	1943	1942		1943	1942	
January	$630,981	$423,300	49.06	$421,441	$334,702	25.92
February	564,639	342,905	64.66	395,143	307,592	28.46
March	698,505	424,914	64.39	406,695	346,530	17.36
April	663,424	432,762	53.30	399,418	345,013	15.77
May	654,474	480,985	36.07	428,514	355,348	20.59
June	553,342	458,846	20.59	405,490	342,880	18.26
July	526,880	553,734	D 4.85	379,494	367,173	3.36
August	636,448	579,241	9.88	419,612	377,582	11.13
September	528,386	562,656	D 6.09	399,443	378,608	5.50
October	565,216	605,535	D 6.66	547,911	423,760	29.30

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	106	108	59	98
February	95	87	56	90
March	118	108	57	101
April	112	110	56	101
May	110	122	60	104
June	93	117	57	100
July	89	141	53	108
August	107	148	59	111
September	89	143	56	111
October	95	154	77	124

D—Denotes decrease.

[fol. 525]

(3) Atlantic Coast Line Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$12,730,132	$6,452,374	97.29	$5,974,052	$4,705,643	26.96
	1943	1942		1943	1942	
January	$12,859,217	$6,721,830	91.31	$6,134,628	$4,929,924	24.44
February	12,689,409	7,344,550	72.77	5,985,023	4,692,476	27.55
March	14,590,183	9,069,455	60.87	6,533,572	5,309,491	23.05
April	14,224,431	9,621,226	47.84	6,400,464	5,205,067	22.97
May	13,923,150	9,803,099	42.03	7,790,191	5,295,149	47.12
June	12,855,420	9,407,085	36.66	6,645,951	5,124,183	29.70
July	11,724,516	8,874,099	32.12	6,609,584	5,151,432	28.31
August	12,224,200	9,493,852	28.76	6,619,111	5,159,675	28.29
September	11,375,814	9,581,808	18.72	6,620,647	5,164,160	28.20
October	11,478,160	10,650,753	7.77	6,834,586	5,222,931	23.75

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	101	104	103	105
February	100	114	100	100
March	115	141	109	113
April	112	149	107	111
May	109	152	130	113
June	101	146	111	109
July	92	138	111	109
August	96	147	111	110
September	89	149	111	110
October	90	135	114	117

[fol. 526]

(4) Central of Georgia Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$2,918,740	$2,209,059	32.13	$1,760,475	$1,504,386	17.02
	1943	1942		1943	1942	
January	$2,739,312	$1,864,269	46.94	$1,820,354	$1,547,939	17.60
February	2,845,002	1,858,282	53.10	1,767,837	1,425,555	24.01
March	3,376,323	2,189,629	54.20	1,915,320	1,526,445	25.48
April	3,317,396	2,178,187	52.30	1,931,234	1,576,967	22.47
May	3,200,089	2,247,915	42.36	2,035,667	1,521,231	33.82
June	3,050,062	2,459,446	24.06	1,936,508	1,548,391	25.07
July	2,965,098	2,590,593	14.46	1,870,415	1,565,246	19.50
August	3,428,008	2,461,946	39.24	1,917,572	1,556,665	23.18
September	3,096,092	2,610,232	18.61	1,875,644	1,587,514	18.15
October	3,215,205	3,095,338	3.87	1,998,051	1,692,402	18.06

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	94	84	103	103
February	97	84	100	95
March	116	99	109	101
April	114	99	110	105
May	110	102	116	101
June	104	111	110	103
July	102	117	106	104
August	117	111	109	103
September	106	118	107	106
October	110	140	113	112

[fol. 527]

(5) Chesapeake & Ohio Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$15,168,434	$12,153,069	24.81	$8,213,331	$7,242,133	13.41
	1943	1942		1943	1942	
January	$15,681,405	$12,081,883	29.79	$8,562,691	$7,628,066	12.25
February	15,248,344	10,560,319	44.39	8,280,995	7,044,343	17.56
March	17,946,233	13,190,594	36.05	9,042,592	7,637,797	18.39
April	17,405,983	15,318,455	13.63	8,941,343	7,824,499	14.27
May	17,235,437	16,631,812	3.63	9,294,402	8,072,878	15.13
June	14,465,067	16,377,317	D11.68	8,823,225	8,061,259	9.45
July	19,133,715	15,926,205	20.14	9,214,354	8,207,745	12.26
August	19,278,013	16,669,536	15.65	9,403,075	8,167,027	15.13
September	18,332,259	16,214,139	13.06	9,374,079	8,028,347	16.76
October	18,844,755	17,583,677	7.17	10,266,647	8,304,802	23.62

Rate of Increase or Decrease

(Month of December—Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	103	99	104	10
February	101	87	101	97
March	118	109	110	105
April	115	126	109	108
May	114	137	113	111
June	95	135	107	111
July	126	131	112	113
August	127	137	114	113
September	121	133	114	111
October	124	145	125	115

D—Denotes Decrease.

[fol. 528]

(6) The Cincinnati, New Orleans & Texas Pacific Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$3,004,735	$2,002,958	50.01	$1,242,105	$1,077,846	15.24
	1943	1942		1943	1942	
January	$2,944,872	$1,963,189	50.00	$1,547,424	$1,292,720	19.70
February	2,799,465	1,975,546	41.71	1,446,512	1,283,884	12.67
March	3,286,323	2,362,576	39.10	1,560,305	1,330,008	17.32
April	3,014,940	2,444,926	23.31	1,577,700	1,378,117	14.48
May	3,124,471	2,523,886	23.80	1,614,422	1,398,580	15.43
June	2,972,864	2,445,184	21.58	1,619,064	1,391,204	16.38
July	3,038,061	2,675,196	13.56	1,659,440	1,433,281	15.78
August	3,034,579	2,801,528	8.32	1,602,649	1,456,094	10.06
September	2,962,181	2,774,668	6.76	1,630,070	1,387,650	17.47
October	3,124,410	2,680,073	16.58	1,696,631	1,420,647	19.43

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	98	98	125	120
February	93	99	116	119
March	109	118	126	123
April	100	122	127	128
May	104	126	130	130
June	99	122	130	129
July	101	134	134	133
August	101	140	129	135
September	99	139	131	129
October	104	134	137	132

[fol. 529]

(7) Clinchfield Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$1,081,381	$1,041,644	3.81	$441,327	$430,089	2.61
	1943	1942		1943	1942	
January	$1,101,973	$1,010,174	9.09	$450,795	$460,654	D 2.14
February	1,033,064	918,043	12.53	493,092	417,498	18.11
March	1,246,337	981,982	26.92	529,683	432,885	22.36
April	1,137,713	1,009,797	12.67	518,292	344,824	19.20
May	1,063,857	1,069,536	D 0.53	515,158	453,020	13.72
June	963,434	1,028,777	D 6.35	510,291	428,284	19.15
July	1,041,483	1,015,230	2.59	506,468	424,883	19.20
August	1,085,515	1,059,602	2.45	498,500	419,825	18.74
September	1,005,456	1,065,011	D 5.59	546,203	415,146	31.57
October	984,016	1,078,681	D 8.78	550,260	437,674	25.72

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	102	97	102	107
February	96	88	112	97
March	115	94	120	101
April	105	97	117	101
May	98	103	117	105
June	89	99	116	100
July	96	97	115	99
August	100	102	113	98
September	93	102	124	97
October	91	104	125	102

D—Denotes Decrease.

[fol. 530]

(8) Gulf, Mobile and Ohio Railroad

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$2,986,903	$2,039,387	46.46	$2,021,297	$1,808,912	11.74
	1943	1942		1943	1942	
January	$3,190,644	$2,054,027	55.34	$1,954,718	$1,490,817	31.12
February	3,116,483	2,011,388	54.94	1,871,398	1,447,698	29.27
March	3,440,671	2,232,430	54.12	1,969,571	1,583,981	24.34
April	3,588,636	2,596,791	38.20	1,980,872	1,626,271	21.80
May	3,075,122	2,868,507	7.20	1,993,263	1,607,171	24.02
June	2,870,879	2,717,836	5.63	1,978,197	1,616,315	22.39
July	3,105,673	2,884,002	7.69	1,930,665	1,700,357	13.54
August	3,179,049	3,167,973	0.35	1,944,896	1,815,214	7.14
September	3,030,861	3,042,769	D 0.39	1,929,041	1,827,817	5.54
October	3,021,622	3,423,996	D11.75	1,964,010	1,992,799	D 1.44

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	107	101	97	82
February	104	99	93	80
March	115	109	97	88
April	120	127	98	90
May	103	141	99	89
June	96	133	98	89
July	104	141	96	94
August	106	155	96	100
September	101	149	95	101
October	101	168	97	110

D—Denotes decrease.

[fol.] 531

(9) Illinois Central Railroad Company (Incl. Yazoo & Miss Val.)

Monthly Comparison of Railway Operating Revenues & Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$20,339,887	$13,546,057	50.15	$16,849,650	$9,523,548	76.93
	1943	1942		1943	1942	
January	$20,358,197	$13,986,244	45.56	$13,105,771	$10,048,680	30.42
February	19,350,701	14,236,752	35.92	12,273,823	9,405,544	30.50
March	21,314,835	16,054,890	32.76	13,467,444	10,292,841	30.84
April	19,903,954	16,130,221	23.40	13,035,447	10,439,065	24.87
May	22,175,548	18,055,683	22.82	14,360,917	10,824,430	32.67
June	20,353,367	17,212,138	18.25	13,590,242	10,865,325	25.08
July	20,433,813	18,510,495	10.39	13,866,486	11,458,428	21.02
August	21,131,127	19,011,225	11.15	13,731,413	11,862,216	15.76
September	20,721,769	19,563,884	5.92	13,395,668	12,061,662	11.06
October	20,851,925	21,201,918	D 1.65	13,786,172	13,447,657	2.52

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	100	103	78	106
February	95	105	73	99
March	105	119	80	108
April	98	119	77	110
May	109	133	85	114
June	100	127	81	114
July	100	137	82	120
August	104	140	81	125
September	102	144	80	127
October	103	157	82	141

D—Denotes Decrease.

[fol. 532]

(10) Louisville & Nashville Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$16,421,369	$10,983,690	49.51	$9,223,746	$7,468,432	23.50
	1943	1942		1943	1942	
January	$15,962,035	$10,981,445	45.35	$9,435,189	$7,892,105	19.55
February	16,165,040	10,338,061	56.36	8,865,616	7,185,085	23.39
March	18,351,402	12,176,307	50.71	9,868,707	7,761,029	27.16
April	17,964,510	13,700,367	31.12	9,469,950	7,771,518	21.85
May	17,620,088	14,000,503	25.85	10,013,761	8,170,241	22.56
June	17,022,661	14,533,316	17.13	9,048,454	8,237,601	9.84
July	17,500,779	14,493,628	20.75	10,029,950	8,392,071	19.52
August	17,674,138	15,204,268	16.24	10,081,648	8,611,183	17.08
September	17,358,382	15,333,921	13.20	10,254,144	8,471,912	21.04
October	17,720,720	16,131,182	9.85	10,123,446	8,927,977	13.39

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	97	100	102	106
February	98	94	96	96
March	112	111	107	104
April	109	125	103	104
May	107	127	109	109
June	104	132	98	110
July	107	132	109	112
August	108	138	109	115
September	106	140	111	113
October	108	147	110	120

[fol. 533]

(11) Nashville, Chattanooga & St. Louis Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$3,301,532	$1,874,571	76.12	$1,754,752	$1,304,371	34.53
	1943	1942		1943	1942	
January	$3,219,111	$1,837,540	75.19	$1,953,292	$1,478,437	32.12
February	3,007,765	1,699,969	76.93	1,857,921	1,366,719	35.94
March	3,504,059	1,981,159	76.87	2,023,183	1,515,953	33.46
April	3,286,310	2,038,502	61.21	2,038,646	1,515,345	34.40
May	3,388,289	2,244,299	50.97	2,114,723	1,490,531	41.88
June	3,669,995	2,527,621	45.20	2,154,848	1,618,558	33.13
July	3,540,096	2,626,545	34.78	2,424,111	1,690,261	43.42
August	3,815,972	2,694,302	41.63	2,501,008	1,665,467	50.17
September	3,553,803	3,135,649	13.34	2,504,956	1,776,118	41.04
October	3,878,915	3,354,935	15.62	2,353,596	1,933,363	21.74

Rate of Increase or Decrease

(Month of December = Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	97	98	111	113
February	91	91	106	105
March	106	106	115	116
April	100	109	116	116
May	103	120	121	114
June	111	135	123	124
July	107	140	138	130
August	116	144	143	128
September	108	167	143	136
October	117	179	134	148

[fol. 534]

(12) Norfolk Southern Railroad Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$578,780	$539,695	7.24	$424,408	$353,979	19.90
	1943	1942		1943	1942	
January	$625,087	$470,933	32.73	$467,021	$385,976	21.00
February	633,714	470,671	34.64	451,948	374,080	20.82
March	735,433	554,336	32.67	514,194	397,584	29.33
April	647,511	584,861	10.71	496,603	399,567	24.29
May	683,570	666,067	2.63	503,085	422,765	19.00
June	786,702	881,379	D10.74	505,713	477,049	6.01
July	790,110	776,778	1.72	533,908	449,448	18.79
August	575,076	682,682	D15.76	461,572	427,688	7.92
September	651,172	766,421	D15.04	488,037	478,873	1.91
October	871,666	720,469	20.99	527,825	471,111	12.04

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	108	87	110	109
February	109	87	106	106
March	127	103	121	112
April	112	108	117	113
May	118	123	119	119
June	136	163	119	135
July	137	144	126	127
August	99	126	109	121
September	113	142	115	135
October	151	133	124	133

D—Denotes Decrease.

[fol. 535]

(13) St. Louis-San Francisco Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$8,450,569	$5,556,592	52.08	$5,002,986	$4,763,756	5.02
	1943	1942		1943	1942	
January	$7,790,041	$5,420,239	43.72	$5,375,212	$4,150,015	29.52
February	7,944,990	5,060,640	57.00	5,124,639	3,843,021	33.35
March	9,090,460	6,043,541	50.42	5,646,705	4,268,999	32.27
April	8,619,328	6,180,066	39.47	5,419,386	4,249,875	27.52
May	7,874,966	6,476,091	21.60	5,798,899	4,420,270	31.19
June	9,381,195	6,989,254	34.22	5,866,536	4,491,164	30.62
July	9,407,293	7,360,871	28.32	5,892,409	4,631,233	27.23
August	9,541,152	7,749,514	23.12	5,851,092	4,890,941	21.87
September	9,048,501	8,254,001	9.63	5,822,666	4,800,319	21.30
October	10,008,360	9,168,928	9.16	6,997,271	5,021,465	39.35

Rate of Increase or Decrease

(Month of December—Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	92	98	107	87
February	94	91	102	81
March	108	109	113	90
April	102	111	108	89
May	93	117	116	93
June	111	126	117	94
July	111	132	118	97
August	113	139	117	101
September	107	149	116	101
October	118	165	140	105

[fol. 536]

(14) Seaboard Air Line Railway

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$11,599,909	$6,647,681	74.50	$7,613,526	$4,937,735	54.19
	1943	1942		1943	1942	
January	$11,478,994	$6,693,300	71.50	$6,301,348	$5,110,411	23.30
February	11,464,791	6,787,574	68.91	6,239,072	4,843,019	28.83
March	13,011,603	8,152,338	59.61	6,671,022	5,258,229	26.87
April	12,313,202	8,399,440	46.50	6,389,783	5,068,456	26.07
May	12,032,973	9,142,452	31.62	6,589,982	5,251,169	25.50
June	11,409,605	9,215,312	23.81	6,364,218	5,261,868	20.95
July	9,949,585	9,092,474	9.43	6,039,566	5,142,257	17.45
August	10,565,264	10,024,401	5.40	5,949,488	5,369,731	10.80
September	10,685,112	10,073,848	6.07	6,184,295	5,489,650	12.65
October	11,240,211	10,276,731	9.38	6,368,794	5,701,822	11.70

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	99	101	83	103
February	99	102	82	98
March	112	123	88	106
April	106	126	84	103
May	104	138	87	106
June	98	139	84	107
July	86	137	79	104
August	91	151	78	109
September	92	152	81	111
October	97	155	84	115

[Vol. 537]

(15) Southern Railway Company

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$19,414,559	$13,086,299	48.36	$9,576,483	$8,897,304	7.63
	1943	1942		1943	1942	
January	$19,277,012	$13,064,200	47.56	$10,414,556	$8,626,460	20.73
February	18,629,309	12,498,028	49.06	9,753,059	8,537,196	14.24
March	21,174,374	14,440,528	46.63	10,869,742	9,070,500	19.84
April	20,355,595	15,323,445	32.84	10,844,160	9,250,069	17.23
May	21,532,206	17,111,973	25.83	10,889,241	9,461,706	15.09
June	19,701,229	17,437,472	12.98	10,535,145	9,418,954	11.85
July	20,336,963	17,899,775	13.62	10,878,850	9,666,816	12.54
August	20,926,230	18,662,004	12.13	10,848,256	9,875,397	9.85
September	20,717,235	19,141,126	8.23	10,936,577	9,742,417	12.26
October	20,602,113	20,011,735	2.95	11,896,832	10,407,757	14.31

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	99	100	109	97
February	96	96	102	96
March	109	110	114	102
April	105	117	113	104
May	111	131	114	106
June	101	133	110	106
July	105	137	114	109
August	108	143	113	111
September	107	146	114	109
October	106	153	124	117

[fol. 538]

(16) Western Railway of Alabama

Monthly Comparison of Railway Operating Revenues and Expenses

December, 1942 v. 1941; Succeeding Months 1943 v. 1942

	Total Operating Revenues			Total Operating Expenses		
	1942	1941	% Inc. or Dec.	1942	1941	% Inc. or Dec.
December	$442,030	$236,851	86.63	$219,315	$206,022	6.45
	1943	1942		1943	1942	
January	$433,870	$245,980	76.38	$232,582	$179,091	29.87
February	383,319	246,554	55.47	236,901	170,049	39.31
March	477,726	309,724	54.24	263,954	190,644	38.45
April	431,061	331,196	30.15	237,336	186,311	27.39
May	439,858	356,215	23.48	252,632	204,029	23.82
June	445,344	365,537	21.83	250,566	201,387	24.43
July	472,883	383,530	23.30	230,718	210,523	9.58
August	470,605	413,505	13.81	245,338	216,127	13.53
September	417,530	425,681	*D 1.91*	264,149	221,340	19.34
October	454,945	430,719	5.62	289,962	214,400	35.24

Rate of Increase or Decrease

(Month of December=Index No. 100)

	1942	1941	1942	1941
December	100	100	100	100
	1943	1942	1943	1942
January	98	104	106	87
February	87	104	108	83
March	108	131	120	93
April	98	140	108	90
May	100	150	115	99
June	101	154	114	98
July	107	162	105	102
August	106	175	112	105
September	94	18	120	107
October	103	182	132	104

D—Denotes Decrease.

[fol. 539]

EXHIBIT No. 13—Witness Makinson

Seaboard Air Line Railway Company

L. R. Powell, Jr., and Henry W. Anderson, Receivers

Statement Showing Manner in Which the Lower Basis of Fares (For Travel in Coaches)

Intrastate in North Carolina Makes It Possible for Passengers To Defeat the Through Published Interstate Fares

From	To			
Raleigh, N. C.	Atlanta, Ga.	Through interstate fare (2.2¢ per mile) Via Seaboard Ry.		$9.31
Raleigh, N. C.	Monroe, N. C.	Intrastate fare (1.65¢ per mile) Via Seaboard Ry.	$2.50	
Monroe, N. C.	Atlanta, Ga.	Interstate fare (2.2¢ per mile) Via Seaboard Ry.	$6.01	8.51
		Possible Saving		$ .80

[fol. 540]

Seaboard Air Line Railway Company

L. R. Powell, Jr., and Henry W. Anderson, Receivers

Statement Showing Manner in Which the Lower Basis of Fares (For Travel in Coaches)

Intrastate in North Carolina Results in Direct Discrimination Against Interstate Passengers (Traveling on the Same Train)

Seaboard Railway Train No. 9, operated from Richmond, Va. to Birmingham, Ala., carries interstate passengers from Henderson, N. C. to Chester, S. C. The same train carries intrastate passengers from Henderson, N. C. to Monroe, N. C.

From	To	Distance	Interstate Fare (2.2¢ per mile)	Intrastate Fare (1.65¢ per mile)
Henderson, N. C.	Chester, S. C.	238	$5.28	
Henderson, N. C.	Monroe, N. C.	193		$3.25

The intrastate passenger travels on the same train as the interstate passenger is furnished with the same accommodations; the intrastate passenger travels 45 miles less than the interstate passenger, but his fare is $2.03 lower. The interstate passenger pays $4.29 for that portion of his journey between Henderson and Monroe, while the intrastate passenger pays $3.25—a difference of $1.04 in favor of the intrastate passenger.

[fol. 541]

Seaboard Air Line Railway Company

L. R. Powell, Jr., and Henry W. Anderson, Receivers

Statement Showing Manner in Which the Lower Basis of Fares (For Travel in Coaches) Intrastate in North Carolina Results in Direct Discrimination Against Interstate Passengers (Shopping in Different Cities)

From	To	Distance	Interstate fare (2.2¢ per mile)	Intrastate fare (1.65¢ per mile)
Roanoke Rapids, N. C.	Portsmouth (Norfolk, Va.)	83 miles	$1.83	
Roanoke Rapids, N. C.	Raleigh, N. C.	91.8 "		$1.55

A person living in Roanoke Rapids, N. C. going to Raleigh, N. C. travels 8.8 miles farther than the same person going to Norfolk, Va. whereas the passenger to Norfolk, Va. pays 28¢ more than the passenger to Raleigh, N. C. thereby resulting in a direct discrimination against the person desiring to shop in Norfolk, Va.

[fols. 542-543] EXHIBIT NO. 14

Witness: Com. Fred C. Hunter

Copy of petition filed by the North Carolina Utilities Commission with the Interstate Commerce Commission on July 8, 1943, seeking an investigation of the interstate fares of railroads operating to and from points within and through the State of North Carolina.

The petition includes as Appendix "A" the interlocutory order of the North Carolina Utilities Commission in its Docket No. 2789, dated July 8, 1943, denying the petition of railroads operating in North Carolina for authority to fully increase their basic civilian coach fares from 1.65 cents per miles to 2.2 cents per mile.

Raleigh, N. C., December 13, 1943.

[fol. 544] BEFORE THE INTERSTATE COMMERCE COMMISSION

Petition of the North Carolina Utilities Commission for Investigation of the Interstate Coach Fares of Railroads Operating to and from Points within and through the State of North Carolina

Comes now the North Carolina Utilities Commission, a statutory agency of the State of North Carolina, respect-

fully petitioning the Interstate Commerce Commission to institute a proceeding of investigation, on its own motion, into the lawfulness and propriety of the rates of fares and charges for the interstate transportation of persons in coach service by railroads operating to, from, between points within and through the State of North Carolina, and for cause shows:

I

That representatives of railroads engaged in the interstate and intrastate transportation of passengers in coaches appeared before your petitioner at a public hearing held in Raleigh, North Carolina, on May 20, 1943, and submitted evidence for the purpose of showing that interstate civilian coach fares in and through the State of North Carolina are just and reasonable and that the revenue therefrom in relation to expense of the service is not excessive or otherwise unlawful. The evidence thus submitted shows the results of passenger service for an extended period of time prior to January 1, 1943. Your petitioner's appraisal of said evidence is set out in its report and order of July 8, 1943, a true copy of which is attached hereto and made [fol. 545] a part hereof, the same being identified as Appendix A.

II

That Appendix B to this petition among other things shows extraordinary progressive increases for the five year period, 1938-1942, in the revenues from Passenger and Allied Services of the passenger carrying roads of primary importance in and through the State of North Carolina which are greatly disproportionate to the more modest corresponding increases in expenses for such services. The aggregate revenue increase in 1942 over 1938 was 229 per cent while expenses increased only 66 per cent. Likewise the total operating ratio of expense to revenue for Passenger and Allied Services for the three lines indicated dropped from 119 in 1938 to 60 in 1942.

III

That Appendix C hereto is a statement of three pages showing total revenue received by Class I railroads in the Southern Region from Passenger and Allied Services and as such revenue is divided among the different kinds of

services, by months for a period of twenty-six months, beginning with January 1941, and ending with February 1943. On page 2 of Appendix C it will be seen that revenue from coach fares, other than commutation, provided 40.7 per cent of the total in 1941. Similarly such revenue was 45.2 per cent of the total for 1942, in which increase there is no doubt reflected the advance of 33⅓ per cent in interstate civilian coach fares in the Southern Region in the latter months of the year. Despite the mitigating effects of so-called excursion coach fares at 1.25 cents per passenger per mile on the revenue from coach fares, the undue burden placed on civilian coach traffic, other than commutation, is apparent by the results in February 1943, when the revenue from civilian coach fares at 2.2 cents per one-way mile and 1.98 cents per round-trip mile and at 1.25 cents per so-called excursion fare mile was 53.7 per cent of the total [fol. 546] revenue from all passenger and allied service, whereas in February 1942, it was only 36.1 per cent of the total and in February 1941, it was 34.4 per cent while the other services; commutation, parlor and sleeping car, mail and express, etc., were bearing the greater burden normally attributable to such services.

Considering the monthly average revenues from Passenger and Allied Services in Southern Region for the year of 1941, as index 100, the coach service revenues resulting from a mixture of fares; 2.2 cents per mile one-way and 1.98 also 1.25 round-trips, increased in the latter months of 1942 and in January and February of 1943, out of all unexplained reason in proportion to revenue increases from other passenger and allied services in the same months as indicated on page 3, Appendix C.

IV

That despite the fact that revenue from coach traffic (other than commutation) is received from fares which range from 1.25 cents to 2.2 cents per passenger per mile, effective interstate since October 1, 1942, and later intrastate in some Southern States, the average revenue per passenger per mile in coach service increased disproportionately in the final months of 1942, continuing the upsurge in the opening months of 1943, in contrast with the revenue per passenger per mile from parlor and sleeping car traffic as depicted in Appendix D hereto.

V

That the substantial variation between the two classes of round-trip fares per passenger per mile on the one hand and the basic one-way fare on the other hand, under existing conditions is excessive and unwarranted, and in the continued absence of justification for the drastic increases in coach fare revenues unaccompanied by a corresponding increase of coach service expenses, such fares will be unjust and unreasonable per se, and in their relation, one [fols. 547-560] to the other, will give rise to undue discriminatory situations as between passengers.

Wherefore, your petitioner prays that the Interstate Commerce Commission will institute an investigation into the coach fares maintained by the railroads furnishing coach classes of service to and from points within, and through the State of North Carolina, for the purpose of determining whether such fares as are labelled "Excursion" by tariff description (Agent M. B. Duggan's I. C. C. No. H-4405) are in fact excursion fares within the meaning of Part 1, Interstate Commerce Act, Sec. 22. And for the further purpose of determining under existing conditions and for the future whether the coach fares hereinbefore described are just and reasonable and free of undue discrimination as between the persons using one-way and round-trip coach service at different charges therefor and as between that group as a whole and the users of other passenger and allied services; and that an order be issued requiring the maintenance of reasonable and otherwise lawful coach fares as the Commission may deem appropriate upon the facts to be adduced.

Respectfully submitted, North Carolina Utilities Commission, Stanley Winborne, Chairman; Fred C. Hunter, Commissioner; R. G. Johnson, Commissioner.

Dated at Raleigh, N. C., July 8, 1943.

[fol. 561]

Appendix B

Revenues, Expenses and Operating Ratios, for Freight and Passenger Services Separately of the Three Principal Passenger Carrying Railroads Operating in North Carolina, During the Five Year Period, 1938 to 1942 Inclusive.

		Operating Revenues and Expenses Assigned and Apportioned To:					
		Freight Service		Passenger and Allied Services		Operating Ratios	
Railroad	Year	Revenues	Expenses	Revenues	Expenses	Freight	Passg
ACL RR	1938	33,564,207	23,440,438	10,599,818	12,051,350	69.8	113.7
	1939	36,895,798	24,272,066	10,203,489	12,399,714	65.8	121.5
	1940	38,411,674	25,805,602	11,676,310	13,761,907	67.2	117.9
	1941	51,297,805	31,364,706	16,106,447	15,494,743	61.1	96.2
	1942	83,517,572	42,854,596	31,591,248	20,093,035	51.3	63.6
SAL RY	1938	32,115,547	23,611,628	7,894,197	10,571,899	73.5	133.9
	1939	34,630,738	25,183,628	9,532,682	11,309,540	72.7	118.6
	1940	37,537,744	26,900,605	10,953,222	12,370,159	71.7	112.9
	1941	49,684,894	34,250,043	14,294,009	14,550,679	68.9	97.5
	1942	77,366,407	47,243,467	32,875,968	19,766,891	61.1	60.1
SOU. RY	1938	74,633,043	46,536,480	14,786,067	17,056,520	62.4	115.4
	1939	84,269,621	50,741,587	14,883,939	17,267,881	60.2	116.0
	1940	90,524,165	54,774,177	15,381,230	18,096,003	60.5	117.6
	1941	118,848,415	68,821,119	21,078,019	19,726,194	57.9	93.6
	1942	159,583,854	87,882,749	45,021,727	25,863,988	55.1	57.5
Total—3 Railroads	1938	140,312,797	93,588,546	33,280,082	39,679,769	66.7	119.2
	1939	155,796,157	100,197,281	34,620,110	40,977,135	64.3	118.4
	1940	166,473,583	107,450,384	38,010,762	44,228,069	64.5	116.3
	1941	219,831,114	134,435,868	52,108,475	49,771,616	51.1	95.5
	1942	320,467,833	177,980,812	109,488,943	65,723,914	55.5	60.0

SOURCE: Schedules 310 and 320, Annual Reports of Above Carriers to the Interstate Commerce Commission.

ACL RR: Atlantic Coast Line Railroad.
SAL RY: Seaboard Air, Line Railway.
SOU. RY: Southern Railway.

[fol. 562]

APPENDIX C—Page 1

Composition, Both Actual and Relative, of Revenue Received From Passenger and Allied Services by the Class I Rail Carriers in the Southern Region During the Twenty-Six Months Period, January 1941 to February 1943, Inclusive. Variations Are Illustrated by Indexes.

Passenger Service Revenue In Dollars

Year	Month	Coach Fares		Parlor and Sleeping Car Fares	Other Than Fares	Total
		Other Than Commutation	Commutation			
1941	January	3,075,941	151,806	3,096,374	1,994,903	8,319,024
	February	2,840,374	138,465	3,297,478	1,976,081	8,252,398
	March	3,065,770	151,589	3,949,802	2,490,765	9,657,926
	April	2,975,628	138,263	3,222,502	2,680,884	9,017,277
	May	2,694,724	134,587	2,045,820	2,672,762	7,547,893
	June	3,126,272	137,703	2,097,883	2,040,105	7,401,963
	July	3,938,140	127,780	1,965,762	1,775,899	7,807,581
	August	4,094,245	131,908	1,763,385	1,912,670	7,902,207
	September	3,500,308	168,832	1,745,122	2,141,991	7,556,253
	October	3,392,134	176,888	2,107,954	2,528,126	8,205,102
	November	3,170,886	167,183	2,240,317	2,136,283	7,714,669
	December	4,935,352	173,945	2,913,179	2,921,075	10,943,551
	Total	40,809,774	1,798,949	30,445,578	27,271,544	100,325,844
	Average	3,400,815	149,912	2,537,132	2,272,629	8,360,488
1942	January	4,211,277	*346,145	3,940,459	2,134,274	10,632,155
	February	4,150,446	*332,254	4,958,495	2,049,765	11,490,960
	March	4,771,260	*362,440	5,259,804	2,719,496	13,113,000
	April	5,447,314	176,816	5,312,184	2,822,579	13,758,893
	May	5,715,843	173,036	6,271,101	2,786,355	14,946,336
	June	6,630,233	183,842	6,139,471	2,146,578	15,100,124
	July	7,527,530	167,979	6,493,905	2,185,304	16,374,717
	August	9,080,452	189,653	7,605,435	2,319,157	19,194,697
	September	9,482,021	176,448	7,585,794	2,975,918	20,220,182
	October	9,784,396	198,113	7,401,806	3,200,292	20,584,607
	November	11,213,567	198,684	7,086,078	3,068,886	21,567,214
	December	12,840,228	208,863	7,099,412	3,662,603	23,811,106
	Total	90,854,567	2,714,273	75,153,944	32,071,207	200,793,991
1943	January	11,237,453	*414,850	7,609,066	2,944,205	22,205,574
	February	12,326,175	*371,542	7,418,331	2,818,256	22,934,304

[fol. 363]

APPENDIX C—Page 2

Percentage Relation To Total Passenger Service Revenue As To Revenue From:

Year	Month	Coach Fares: Other Than Commutation	Coach Fares: Commutation	Parlor And Sleeping Car Fares	Other Than Fares	Total
1941	January	37.0	1.8	37.2	24.0	100
	February	34.4	1.7	40.0	23.9	100
	March	31.7	1.6	40.9	25.8	100
	April	33.0	1.5	35.7	29.8	100
	May	35.7	1.8	27.1	35.4	100
	June	42.2	1.9	28.3	27.6	100
	July	50.4	1.6	25.2	22.8	100
	August	51.8	1.7	22.3	24.2	100
	September	46.3	2.2	23.1	28.4	100
	October	41.3	2.2	25.7	30.8	100
	November	41.1	2.2	29.0	27.7	100
	December	45.1	1.6	26.6	26.7	100
	Total	40.7	1.8	30.3	27.2	100
1942	January	39.6	3.2	37.1	20.1	100
	February	36.1	2.9	43.1	17.9	100
	March	36.4	2.8	40.1	20.7	100
	April	39.6	1.3	38.6	20.5	100
	May	38.2	1.2	42.0	18.6	100
	June	43.9	1.2	40.7	14.2	100
	July	46.0	1.0	39.7	13.3	100
	August	47.3	1.0	39.6	12.1	100
	September	46.9	0.9	37.5	14.7	100
	October	47.5	1.0	36.0	15.5	100
	November	52.0	0.9	32.9	14.2	100
	December	53.9	0.9	29.8	15.4	100
	Total	45.2	1.3	37.5	16.0	100
1943	January	50.6	1.9	34.3	13.2	100
	February	53.7	1.6	32.4	12.3	100

[fol. 564]

APPENDIX C—Page 3

Indexes

1941 Monthly Average Equals 100

Passenger Service Revenue

Year	Month	Coach Fares: Other Than Commutation	Coach Fares: Commutation	Parlor And Sleeping Car Fares	Other Than Fares	Total
1941	January	90.4	101.3	122.0	87.8	99.5
	February	83.5	92.4	130.0	86.9	98.7
	March	90.1	101.1	155.6	109.6	115.5
	April	87.4	92.2	127.1	118.0	107.8
	May	79.2	89.8	80.5	117.6	90.3
	June	91.8	91.9	82.6	89.8	88.6
	July	115.8	85.2	77.4	78.1	93.4
	August	120.4	88.0	69.5	84.1	94.5
	September	102.9	112.6	68.6	94.2	90.4
	October	99.7	118.0	83.0	111.1	98.1
	November	93.3	111.4	88.3	95.8	92.3
	December	145.1	116.0	114.8	131.1	130.9
1942	January	123.9	*230.9	155.3	95.8	127.1
	February	122.0	*221.6	195.4	92.0	137.4
	March	140.3	*241.8	207.3	122.0	156.8
	April	160.1	118.0	209.4	124.3	164.5
	May	168.0	115.4	247.2	122.5	178.7
	June	194.9	122.6	242.0	94.4	180.5
	July	221.3	112.0	255.9	96.2	195.8
	August	266.9	126.5	299.8	102.0	229.4
	September	278.8	117.7	299.0	130.9	241.9
	October	287.7	132.2	291.7	140.8	246.0
	November	329.7	132.5	279.3	137.7	257.8
	December	377.5	139.1	279.8	164.2	285.0
1943	January	330.4	*276.7	299.9	132.2	265.5
	February	362.4	*247.8	292.2	126.5	274.2

SOURCE: Interstate Commerce Commission, Bureau of Transport Economics and Statistics, Statements Nos. M-220 and M-250. (Subject to revision).

* Effective with January 1943 the Illinois Central RR. reported as "Commutation" certain traffic previosly reported as "All Other Passenger." Figures for January, February and March 1942 and January and February 1943 have been re-stated to afford a correct comparison with the corresponding months of 1943.

[fol. 565]

Appendix D

Average Revenue per Passenger per-mile by Classes of Service. Received by Class I Rail Carriers in the Southern Region During the Twenty-Six Months Period, January 1941 to February 1943, Inclusive.

Year	Month	Coach Traffic		Parlor and Sleeping Car Traffic
		Other Than Commutation	Commutation	
1941	January	1.46	1.05	2.37
	February	1.42	1.06	2.35
	March	1.46	1.08	2.36
	April	1.43	1.09	2.31
	May	1.41	1.08	2.30
	June	1.45	1.06	2.24
	July	1.45	1.07	2.41
	August	1.43	1.09	2.33
	September	1.44	0.98	2.39
	October	1.46	0.96	2.31
	November	1.42	0.99	2.48
	December	1.48	1.00	2.55
	Average	1.45	1.04	2.37
1942	January	1.44	0.99	2.30
	February	1.51	1.12	2.39
	March	1.52	1.16	2.51
	April	1.54	1.13	2.40
	May	1.54	1.14	2.94
	June	1.51	1.14	2.55
	July	1.49	1.15	2.62
	August	1.53	1.16	2.86
	September	1.58	1.14	2.35
	October	1.79	1.15	2.70
	November	1.82	1.17	2.55
	December	1.74	1.17	2.68
	Average	1.61	1.12	2.58
1943	January	1.78	1.25	2.52
	February	1.81	1.30	2.56

SOURCE: Interstate Commerce Commission, Bureau of Transport Economics and Statistics, Statements Nos. M-220 and M-250. (Subject to revision.)

[fol. 566]

EXHIBIT No. 15—Witness: H. M. Nicholson

Exhibit Containing List of Passenger Trains Formerly Operated Within North Carolina which have been Discontinued since January 1, 1941. The Lengths of Runs in the State, of Those Trains are also Shown.

Railroad	Train Number	Between	And	Miles One Way
Atlantic Coast Line R. R.	37, 38–36, 39	Rocky Mount	Kinston	75
	33–34)	Washington	Parmele	25
	*426–427)			
Durham & Southern Ry.	*11–12	Durham	Dunn	57
East Tennessee & Western North Carolina R. Rr	1– 2	Elk Park	Cranberry	2
Southern Ry.	1– 4	Winston-Salem	Charlotte	83
	@13–14	Raleigh	Goldsboro	48
	@35–36	Marion	Shelby	55
	@ 3– 6	Winston-Salem	Greensboro	28
	@15–16	Asheville	Paint Rock	43
	@15–16	Greensboro	Raleigh	81
	@35–36	Asheville	Salisbury	141
	@67–68	Bullock	Durham	46
Total				684

SOURCE: Biennial Report 1941–1942 of the North Carolina Utilities Commission.

* Mixed Train Service.

@ Suspended During War Emergency.

[fol. 567]

EXHIBIT No. 16—Witness: H. M. Nicholson

Average Revenue per Passenger per-mile by Classes of Service Received by Class I Rail Carriers in the Southern Region During the Thirty-One Month Period, January 1941 to July 1943, Inclusive.

(In Cents)

Year	Month	Coach Traffic		Parlor and Sleeping Car Traffic
		Other Than Commutation	Commutation	
1941	January	1.46	1.05	2.37
	February	1.42	1.06	2.35
	March	1.46	1.08	2.36
	April	1.43	1.09	2.31
	May	1.41	1.08	2.30
	June	1.45	1.06	2.24
	July	1.45	1.07	2.41
	August	1.43	1.09	2.33
	September	1.44	0.98	2.39
	October	1.46	0.96	2.31
	November	1.42	0.99	2.48
	December	1.48	1.00	2.55
	Average	1.45	1.04	2.37
1942	January	1.44	0.99	2.30
	February	1.51	1.12	2.39
	March	1.52	1.16	2.51
	April	1.54	1.13	2.40
	May	1.54	1.14	2.94
	June	1.51	1.14	2.55
	July	1.49	1.15	2.62
	August	1.53	1.16	2.86
	September	1.58	1.14	2.35
	October	1.79	1.15	2.70
	November	1.82	1.17	2.55
	December	1.74	1.17	2.68
	Average	1.61	1.12	2.58
1943	January	1.78	1.25	2.52
	February	1.81	1.30	2.56
	March	1.78	1.26	2.59
	April	1.83	1.28	2.54
	May	1.80	1.28	2.55
	June	1.82	1.33	2.62
	July	1.79	1.73	2.67

SOURCE: Interstate Commerce Commission, Bureau of Transport Economics and Statistics, Statements Nos. M-220 and M-250.

[fol. 568]

EXHIBIT No. 17—Witness: H. M. Nicholson

Composition, Both Actual and Relative, of Revenue Received From Passenger and Allied Services by the Class I Rail Carriers in the Southern Region During the Thirty-One Month Period, January 1941 to July 1943, Inclusive. Variations are Illustrated by Indexes.

Passenger Service Revenue in Dollars

Month	Coach Fares		Parlor and Sleeping Car Fares	Other Than Fares	Total
	Other Than Commutation	Commutation			
1941					
January	3,075,941	151,806	3,096,374	1,994,903	8,319,024
February	2,840,374	138,465	3,297,478	1,976,081	8,252,398
March	3,065,770	151,589	3,949,802	2,490,765	9,657,926
April	2,975,628	138,263	3,222,502	2,680,884	9,017,277
May	2,694,724	134,587	2,045,820	2,672,762	7,547,893
June	3,126,272	137,703	2,097,833	2,040,105	7,401,963
July	3,938,140	127,780	1,965,762	1,775,899	7,807,581
August	4,094,245	131,908	1,763,385	1,912,670	7,902,207
September	3,500,308	168,832	1,745,122	2,141,991	7,556,253
October	3,392,134	176,888	2,107,954	2,528,126	8,205,102
November	3,170,886	167,183	2,240,317	2,136,283	7,714,669
December	4,935,352	173,945	2,913,179	2,921,075	10,943,551
Total	40,809,774	1,798,949	30,445,578	27,271,544	100,325,844
Average	3,400,815	149,912	2,537,132	2,272,629	8,360,488
1942					
January	4,211,277	*346,145	3,940,459	2,134,274	10,632,155
February	4,150,446	*332,254	4,958,495	2,049,765	11,490,960
March	4,617,545	*362,440	5,262,664	2,719,496	12,962,145
April	5,287,212	*333,390	5,315,712	2,822,579	13,758,893
May	5,560,166	*328,707	6,271,101	2,786,362	14,946,336
June	6,461,437	*352,638	6,139,471	2,146,578	15,100,124
July	7,360,949	*334,559	6,493,905	2,185,304	16,374,717
August	9,080,452	189,653	7,605,435	2,319,157	19,194,697
September	9,482,021	176,448	7,585,794	2,975,919	20,220,182
October	9,784,396	198,113	7,401,806	3,200,292	20,584,607
November	11,213,567	198,684	7,086,078	3,068,885	21,567,214
December	12,840,228	208,863	7,099,412	3,662,603	23,811,106
Total	90,049,696	3,361,894	75,160,332	32,071,214	200,643,136
1943					
January	11,237,453	*414,850	7,609,066	2,944,205	22,205,574
February	12,326,175	*371,542	7,418,331	2,818,256	22,934,304
March	14,878,025	*404,784	8,010,166	3,587,175	26,880,150
April	14,633,256	*395,408	8,238,376	3,546,880	26,813,920
May	15,609,280	*394,585	8,190,945	3,252,533	27,447,343
June	16,508,017	*446,045	7,795,354	3,023,231	27,772,647
July	16,570,479	*664,130	7,516,147	2,535,655	27,286,411

fol. 569]

Year	Month	Percentage Relation to Total Passenger Service Revenue as to Revenue From: Coach Fares: Other Than Commutation	Coach Fares: Commutation	Parlor And Sleeping Car Fares	Other Than Fares	Total
1941	January	37.0	1.8	37.2	24.0	100
	February	34.4	1.7	40.0	23.9	100
	March	31.7	1.6	40.9	25.8	100
	April	33.0	1.5	35.7	29.8	100
	May	35.7	1.8	27.1	35.4	100
	June	42.2	1.9	28.3	27.6	100
	July	50.4	1.6	25.2	22.8	100
	August	51.8	1.7	22.3	24.2	100
	September	46.3	2.2	23.1	28.4	100
	October	41.3	2.2	25.7	30.8	100
	November	41.1	2.2	29.0	27.7	100
	December	45.1	1.6	26.6	26.7	100
	Total	40.7	1.8	30.3	27.2	100
1942	January	39.6	3.3	37.0	20.1	100
	February	36.1	2.9	43.1	17.9	100
	March	35.6	2.8	40.6	21.0	100
	April	38.4	2.4	38.6	20.6	100
	May	37.2	2.2	42.0	18.6	100
	June	42.8	2.3	40.7	14.2	100
	July	44.9	2.1	39.7	13.3	100
	August	47.3	1.0	39.6	12.1	100
	September	46.9	0.9	37.5	14.7	100
	October	47.5	1.0	36.0	15.5	100
	November	52.0	0.9	32.9	14.2	100
	December	53.9	0.9	29.8	15.4	100
	Total	44.9	1.7	37.4	16.0	100
1943	January	50.6	1.9	34.3	13.2	100
	February	53.7	1.6	32.4	12.3	100
	March	55.4	1.5	29.8	13.3	100
	April	54.6	1.5	30.7	13.2	100
	May	56.9	1.4	29.8	11.9	100
	June	59.4	1.6	28.1	10.9	100
	July	60.8	2.4	27.5	9.3	100

[fol. 570]

Indexes

1941 Monthly Average Equals 100

Percentage Relation to Total Passenger Service Revenue as to Revenue From:

Year	Month	Coach Fares: Other Than Commutation	Coach Fares: Commutation	Parlor And Sleeping Car Fares	Other Than Fares	Total
1941	January	90.4	101.3	122.0	87.8	99.5
	February	83.5	92.4	130.0	86.9	98.7
	March	90.1	101.1	155.6	109.6	115.5
	April	87.4	92.2	127.1	118.0	107.8
	May	79.2	89.8	80.5	117.6	90.3
	June	91.9	91.9	82.6	89.8	88.6
	July	115.8	85.2	77.4	78.1	93.4
	August	120.4	88.0	69.5	84.1	94.5
	September	102.9	112.6	68.8	94.2	90.4
	October	99.7	118.0	83.0	111.1	98.1
	November	93.3	111.5	88.3	94.0	92.3
	December	145.1	116.0	114.8	128.5	130.9
1942	January	123.9	*230.9	155.3	93.9	127.1
	February	122.0	*221.6	195.4	90.2	137.4
	March	135.7	*241.8	207.4	119.5	155.0
	April	155.5	*222.4	209.4	124.3	164.5
	May	163.5	*219.3	247.2	122.5	178.7
	June	190.5	*235.2	242.0	94.4	180.5
	July	216.4	*223.2	255.9	96.2	195.8
	August	266.9	126.5	299.8	102.0	229.4
	September	278.8	117.7	299.0	130.9	241.9
	October	287.7	132.2	291.7	140.8	246.0
	November	329.7	132.5	279.3	135.0	257.8
	December	377.5	139.3	279.8	161.2	285.0
1943	January	330.4	*276.7	299.9	129.6	265.5
	February	362.4	*247.8	292.2	124.0	274.2
	March	437.5	*270.0	315.7	157.9	321.5
	April	430.3	*263.8	324.7	156.0	320.7
	May	459.0	*263.2	322.8	143.2	328.3
	June	485.4	*297.5	307.2	133.0	332.2
	July	487.2	*443.0	296.3	111.5	326.4

SOURCE: Interstate Commerce Commission, Bureau of Transport Economics and Statistics, Statements Nos. M-220 and M-250.

* Effective with January 1943 the Illinois Central R. R. reported as "Commutation" certain traffic previously reported as "All Other Passenger." Figures for January, to July 1942, inclusive, have been re-stated to afford a correct comparison with the corresponding months of 1943.

Raleigh, N. C.

December 13, 1943.

[fol. 571] EXHIBIT No. 18

Witness: J. C. Bowman

Report of December 8, 1943, by Inspector J. C. Bowman to the North Carolina Utilities Commission

At approximately 5:00 P. M., on December 8, 1943, I visited the Seaboard Air Line Railway passenger station in Raleigh, N. C., and attempted to purchase a ticket to Hamlet, N. C., for use on either of their streamlined trains one of which is scheduled South from Raleigh at 12:05 A. M., the other at 1:05 A. M. The agent refused to sell me a ticket to Hamlet, N. C., or to any other point in the State of North Carolina for use on these trains, stating that Columbia, S. C., is the nearest point in the direction of Hamlet, N. C., to which a ticket could be purchased for use on the streamlined trains.

(S.) J. C. Bowman, North Carolina Utilities Commission.

[fol. 572] Report of December 8, 1943, by Inspector J. C. Bowman to the North Carolina Utilities Commission

On the morning of December 8, 1943, I entered the passenger station at Selma, N. C., which station is operated jointly by the Atlantic Coast Line Railroad and the Southern Railway. Upon request, the agent informed me that the coach fare by Southern Railway from Selma, N. C., to Harriman, Tenn., was $11.74. He also stated to me that a ticket from Selma, N. C., to Harriman, Tenn., based on a combination of fares over Hot Springs, N. C., and Newport, Tenn., could not be purchased for any amount less than $11.74, which includes the Federal tax of 10%.

(S.) J. C. Bowman, Inspector, North Carolina Utilities Commission.

[fol. 573] Report of December 9, 1943, by Inspector J. C. Bowman to the North Carolina Utilities Commission

At 9:00 A. M., December 9, 1943, upon inquiry of the Agent of the Seaboard Railway at their station in Henderson, N. C. I learned that the Streamlined trains do not stop at Henderson but that other trains are scheduled Southbound at 4:15 A. M., 9:09 A. M. and 8:05 P. M. I was quoted a coach fare of $5.97 including Federal tax to

Columbia, S. C. I then asked whether it would be cheaper to buy a ticket to Hamlet and rebuy another from there to Columbia, whereupon the Agent stated that if anything the combination basis would exceed the single factor fare.

(S.) J. C. Bowman, Inspector, North Carolina Utilities Commission.

[fol. 574] Report of December 21, 1943, by Inspector J. C. Bowman to the North Carolina Utilities Commission

Upon my arrival in Washington I immediately called the Atlantic Coast Line depot to ask what time I could catch a train to Aurora, N. C., and was told that the train was due to arrive at 1:00 p. m. on the following day. So I spent the night in Washington, and at five minutes to one on the following day I entered the agent's office stating that I wanted to ride the train to Aurora and would like to purchase a ticket. The agent replied that he had no tickets for sale but I could pay the conductor on the train.

I asked the agent how long it would be until the train would arrive, and he told me that it would be about thirty minutes late, and at that point, he asked me to come in his office and have a seat. So I sat down and waited until three o'clock p. m. when the train finally came in. The train crew shifted cars on the yard until 4:00 p. m. at which time I was told by the depot agent that I could get on the train, so I got on and waited until 4:30 p. m. when a negro porter came through the coach and told me that the train crew had gone to lunch.

At about 5:00 p. m. the train crew came back and shifted cars again until 6:40 p. m. and then we pulled out for Aurora five hours and forty minutes late, arriving in Aurora at 8:00 p. m. The train was made up with one coach and five or six box and flat cars. The coach was made of wood.

The coach had no heat except a stove which was located in the freight and baggage compartment, and as a result it was uncomfortably cold. The seats were so filthy with dirt and dust that I had to take a large map out of my brief case and spread it out on the seat to keep from ruining my clothes. From the time I arrived in Washington until my trip was completed in Aurora twenty two hours had elapsed.

It is difficult to imagine a more unsatisfactory condition in the way of transportation for the traveling public, and

there is little wonder few people wish to use the train, because in the long years I have worked for the Commission, I cannot recall ever having made a more miserable trip, either by bus or train.

Yours very respectfully, (S.) J. C. Bowman, Inspector, North Carolina Utilities Commission.

[fol. 575] EXHIBIT No. 19

Witness: C. B. Wade

Report of December 21, 1943, by Inspector C. B. Wade to the North Carolina Utilities Commission

On December 21 I rode the Atlantic Coast Line local mixed train between Fayetteville and Wilmington and return.

This train left Fayetteville at 8:05 A. M. and consisted of six freight cars, one passenger and mail combination car and one combination passenger and express car. It is heated by coal stoves and is lighted by kerosene lamps.

On leaving Fayetteville the passenger-mail coach was not comfortable until about ten o'clock at which time it was extremely hot and stuffy on account of poor ventilation. Passengers complained of the bad air and fumes in the car. On account of the short pipes to the coal stoves it was impossible to get the coach warm at the time of starting. The only oil lamp burning in the coach was smoking badly and was about to explode when I called a trainman's attention to the bad odor and fumes from the lamp and he extinguished it with a cloth. It was then necessary to open the door and some of the windows in the coach for ventilation. The glass in the doors and windows was dirty.

The toilets were without light.

The passenger compartment of the express car was equipped with seat benches on each side of one end, this being used for overflow passengers from the regular coach.

The passenger coach and the express coach were both made of wood.

Approximately 106 passengers were handled on the two trips. I think I can safely assume that 75 or 80 per cent of the passengers were local.

On the return trip from Wilmington persons were compelled to stand. On the trip going from Fayetteville to Wilmington the express car was also used to take care of the overflow. On the return trip from Wilmington there were eight freight cars, the passenger and mail combination car and the express car.

The distance between Fayetteville and Wilmington is 85 miles. The running time was approximately 3 hours and 45 minutes in each direction. Only a small portion of this route is paralle-d with bus service.

(S.) C. B, Wade, Inspector, North Carolina Utilities Commission.

[fol. 576]

EXHIBIT No. 20—Witness Whitnock

Net Railway Operating Income Before Federal Income Taxes

Class I Railroads Operating In North Carolina

1936–1943

(Dollar figures in thousands)

Carrier	1936	1937	1938	1939	1940	1941	1942	12 months ending 10/30/43	% increase year ending 9/30/43 over 1941
1. A. C. L.	$4,483	$5,150	$2,391	$3,811	$3,876	$13,814	$41,846	$61,366	344.0%
2. Clinchfield	2,788	3,275	2,237	3,393	3,935	5,888	6,531	6,159	4.6
3. L. & N. R. R.	19,985	16,605	11,807	16,925	19,755	34,991	61,891	81,984	134.3
4. N. & W.	41,385	39,210	26,147	37,719	43,204	52,926	61,205	66,062	24.8
5. Norfolk Southern	303	379	222	351	248	849	1,773	1,578	85.9
6. S. A. L.	2,921	4,349	1,449	3,594	4,404	10,107	33,946	47,276	367.8
7. Southern Ry.	19,613	15,377	14,384	20,777	21,457	38,700	75,591	97,816	152.8
Total—7 roads	$91,478	$84,345	$58,637	$86,570	$96,879	$157,275	$282,783	$362,211	130.3%

Source: Reports of the carriers to the Interstate Commerce Commission.

[fol. 577]

Freight and Passenger Revenues, 1936–43

Railroads Operating in North Carolina

(Dollar figures in thousands)

Freight Revenues	1936	1937	1938	1939	1940	1941	1942	12 Mos. Ended October 1943
A C L	$31,638	$34,891	$32,410	35,567	$37,069	$49,826	$82,310	$103,013
Clinchfield	6,204	6,752	5,791	7,168	8,362	11,007	12,212	12,541
L & N	78,278	76,864	67,686	76,492	85,587	104,063	136,690	151,379
N & W	89,903	89,836	72,899	88,550	100,305	113,337	125,699	129,686
Norfolk Southern	4,127	4,579	4,147	4,403	4,335	5,401	7,378	7,725
S A L	29,927	33,030	31,005	33,666	36,492	48,477	76,351	88,461
Southern	77,982	79,428	72,950	82,345	88,592	116,520	156,635	172,092
Total	$318,059	$325,380	$286,808	$328,191	$360,742	$448,631	$597,275	$664,897
% increase 12 months ended Oct. 31, 1943 over each year	109.0%	104.3%	131.8%	102.6%	84.3%	48.2%	11.3%	
Passenger Revenues								
A C L	$6,763	$7,789	$6,916	$6,506	$7,864	$11,818	$25,822	$40,954
Clinchfield	54	56	45	40	44	58	87	160
L & N	6,595	7,209	6,199	6,013	6,475	8,976	23,288	43,143
N & W	2,220	2,275	1,942	1,904	2,094	3,735	9,938	15,613
Norfolk Southern	96	94	53	44	45	70	240	325
S A L	4,626	5,533	4,949	6,313	7,526	11,026	27,169	39,174
Southern	9,846	10,419	8,786	8,742	9,178	14,233	36,265	56,138
Total	$30,200	$33,375	$28,890	$29,562	$33,226	$49,916	$122,809	$195,507
% increase 12 months ended Oct. 31, 1943 over each year	547.4%	485.8%	576.7%	561.3%	488.4%	291.7%	59.2%	

Source: Reports of the carriers to the ICC.

[fol. 578]

Passenger Service—Net Railway Operating Income, 1936-42

Seven Railroads Operating in North Carolina

Passenger Service Net Railway Operating Income	1936	1937	1938	1939	1940	1941	1942
A. C. L.	d $2,790	d $2,492	d $3,519	d $4,291	d $4,194	d $1,201	$4,446
Clinchfield	d 92	d 129	d 124	d 132	d 112	d 90	d 85
L. & W.	d 5,429	d 5,888	d 6,557	d 6,404	d 6,816	d 4,916	2,070
N. & W.	d 3,741	d 3,751	d 4,405	d 4,013	d 4,123	d 3,275	833
Nor. Sou.	d 211	d 226	d 195	d 171	d 212	d 184	d 135
S. A. L.	d 3,954	d 3,208	d 4,084	d 2,997	d 2,807	d 1,034	10,655
Southern	d 3,898	d 4,122	d 4,929	d 4,809	d 5,223	d 928	9,749
Seven Roads Total	d 20,115	d 19,816	d 23,813	d 22,817	d 23,486	d 11,628	27,533

Source: Annual Reports of the Carriers to the Interstate Commerce Commission.

d: Deficit.

[fol. 579]

Freight and Passenger Service Operating Ratios, 1936–1943

Railroads Operating in North Carolina

Carrier	1936	1937	1938	1939	1940	1941	1942	Jan.–Sept. 1943 (Estimated)
Passenger Service								
A C L	108.4%	104.6%	113.7%	121.5%	117.9%	96.2%	63.6%	51.2%
Clinchfield	169.0	198.1	194.8	222.6	195.5	163.5	143.8	109.4
L & N	129.8	134.3	142.6	142.0	144.0	118.9	72.0	52.5
N & W	164.3	167.1	191.3	179.9	178.0	137.6	76.5	72.7
Norfolk Southern	175.5	189.4	198.1	188.2	223.1	192.6	108.9	132.6
S A L	137.7	124.5	133.9	118.6	112.9	97.5	60.1	51.5
Southern	111.6	109.0	115.4	116.0	117.7	93.6	57.4	47.1
Total	123.6	120.9	130.2	128.5	127.1	103.7	63.9	52.3
Freight Service								
A C L	67.4	67.7	69.8	65.8	67.2	61.1	51.3	50.8
Clinchfield	53.6	50.7	53.1	46.2	45.9	40.4	40.7	46.1
L & N	65.0	67.9	67.2	64.7	64.9	58.5	55.9	57.1
N & W	47.7	50.8	53.6	49.6	49.8	48.6	52.3	53.6
Norfolk Southern	76.4	75.3	77.6	75.4	76.3	69.8	63.5	68.6
S A L	70.0	70.2	73.5	72.7	71.7	68.9	61.1	57.0
Southern	61.7	65.4	62.4	60.2	60.5	57.9	55.1	54.6
Total	60.0	62.6	63.4	60.2	60.3	57.0	54.7	54.7

Source: Reports of the carriers to the I. C. C. except for 1943 which was estimated by the method described in sheet 2 of this exhibit.

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[fol. 580] Method Used in Assigning 1943 Revenues and Expenses to Passenger Service

Passenger Revenues

The general formula used in assigning operating revenues to passenger service is:

$$Rp=Pr+Mr+Er+KOr$$

where,

Rp=Revenues assigned to passenger service
Pr=Passenger revenues
Mr=Mail revenues
Er=Express revenues
Or=All other operating revenues, excluding freight revenues
K=The 1942 ratio of Ap—(Pr+Mr+Ed) to Or

Data for previous years indicate that Passenger Revenues, Mail Revenues and Express Revenues have been assigned by the carriers almost entirely to the Passenger Service. In allocating All Other Operating Revenues, excluding Freight Revenues which are almost entirely assigned to the Freight Service, we have assumed that the 1943 proportion to be assigned to the Passenger Service has not differed materially from that existing in 1942. Only 6% of the revenues assigned to Passenger Service in 1942 by the seven roads shown in this exhibit was derived from the group of All Other Operating Revenues.

Passenger Expenses

Railway operating expenses assigned to passenger service are derived from the following formula:

$$Ep=KOp$$

where,

Ep=Railway operating expenses assigned to passenger service
Op=All railway operating expenses
K=Percentage of all railway operating expenses assigned to passenger services, where K is determined by the Least Squares regression equation based on the relationship between the ratio of Passenger

Expenses to Railway Operating Expenses with the ratio of Passenger Car-miles to Total Transportation Car-miles.

The accuracy of this method of estimating operating expenses assignable to passenger service is indicated by the fact that the coefficient of correlation for the eight roads in the years 1936-42 was 94.0% and the standard error of estimate was .85%.

(Here follows 1 paster, folio 581)

[fol. 581]

Rate of Return on Various Investment Bases
12 Mos. Ended October 31, 1943

Railroads Operating in North Carolina
(Dollar figures in thousands)

(1) Carrier	(2) Investment In Ry. Propery Used in Transp. Service 12/31/42	(3) Book Investment in Transp. Property 12/31/42	(4) Accrued Depreciation and Accr. Amortization of Defense Projects 12/31/42	(5) Cash and Materials and Supplies 12/31/42	(6) Net Book Investment plus Cash and Materials and Supplies 12/31/42 (3)−(4)+(5)	(7) Net Ry. Op. Inc. before Fed. Inc. Taxes 10/31/43	(8) Rent for Leased Road and Equipment 1942	(9) Net Ry. Op. Inc. before Fed. Inc. Taxes 12 mos. to 10/31/43 minus Rents for Leased Road and Equip.[2] (7)−(8)	(10) Rate of Return Col. (7) ÷ (2+5)	(11) Rate of Return Col. (9) ÷ (6)	(12) Rate of Return Col. (7) ÷ (6)
A. C. L.	$296,185	$288,086	$36,450	$24,769	$276,405	$61,336	$228	$61,108	19.1%	22.1%	22.2%
Clinchfield	68,807	3,070	398	6,069	8,741	6,159	2,178	3,981	8.2	45.5	70.5
L & N	476,832	468,138	102,612	42,474	408,000	81,984	307	81,677	15.8	20.0	20.1
N & W	497,410	529,427	95,989	26,019	459,457	66,062	[1]	66,062	12.6	14.4	14.4
Nor.-Sou.	19,702	18,855	1,764	2,105	19,196	1,578	65	1,513	7.2	7.9	8.2
S. A. L.	325,255	277,936	34,893	21,717	264,760	47,276	591	46,685	13.6	17.6	17.9
Southern	620,112	553,361	48,237	33,397	538,521	97,816	2,618	95,198	15.0	17.7	18.2
Total	$2,304,393	$2,138,873	$320,343	$156,550	$1,975,080	$362,211	$5,987	$356,224	14.7%	18.0%	18.3%

[1] Less than $1,000.
[2] Since rent for leased road and equipment is not reported by months, it was assumed that such rent for the 12 months ended Oct. 31, 1943 was the same as for the year 1942.

[fol. 582] Source: Annual and monthly reports of the carriers to the I. C. C.
Col. 2 Schedule 211N.
Col. 3 Accounts 701, 702, 702½.
Col. 4 Accounts 775, 775½, 776, 776½, 777.
Col. 5 Accounts 708, 716.
Col. 8 Account 542.

[fol. 583–710]

Office of Price Administration
Washington, D. C.

Comparative Rates of Return on Various Bases

Class I Line-haul Railways

Southern Region, 1937

1.	Final Value as of 1/1/37	$2,440,000,000
2.	Net Book Investment plus Cash & Materials and Supplies of 12/31/36	$2,272,264,296
3.	(a) As % of I. C. C. Final Value	93.1%
4.	Investment in Ry. Property Used in Transp. Service & Cash and Mat. and Supp. 12/31/36	$3,174,452,058
5.	(a) As % of I. C. C. Final Value	130.1%
6.	Net Ry. Op. Income, 1937	$74,160,011
7.	Fed. Income Taxes, 1937	1,631,587
8.	N. R. O. I. Bef. Inc. Taxes, 1937	$75,791,598
9.	Rent for Leased Road & Equipment, 1937	$13,408,768
10.	N. R. O. I. Bef. Fed. Inc. Taxes Minus Rent for Leased Road & Equipment, 1937	$62,382,830

Rate of Return Bef. Fed. Income Taxes

11.	(a) On I. C. C. Final Value	3.1%
12.	(b) On Net Book Investment, etc.	3.3%
13.	(c) On Investment in Ry. Property used in Transportation Service, etc.	2.4%
14.	(d) N. R. O. I. bef. Fed. Inc. Taxes Minus Rent for Leased Road & Equipment (Line 10) ÷ by Net Bk. Invest. (Line 2)	2.7%

Sources: I. C. C., *Statistics of Railways in the U. S. and Fifteen Percent Case, 1937 38, 226, I. C. C. 41.*

Line 1—*Fifteen Per Cent Case, 1937–38*, 226, I. C. C. 161.
Line 2—Annual reports Accts. 701, 702, 708, 716 less 775, 775½, 776, 776½, 777.
Line 4—Annual reports, Schedule 211N & Accts. 708 and 716.
Line 9—Annual reports, Account 542.

[fols. 711-731] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket Nos. 28963 (Ala.), 29000 (Ky.), 29037 (Tenn.), 29036 (N. C.)

In the Matter of ALABAMA, KENTUCKY, TENNESSEE (Intrastate Fares), NORTH CAROLINA INTRASTATE COACH FARES

TRANSCRIPT OF ORAL ARGUMENT

* * * * * * *

[fol. 732] riers, Mr. Commissioner, were deficit carriers, then, and they continued to be deficit carriers in so far as their passenger operation until 1942. At the present time they are showing the largest increases in passenger fares of any of the carriers which serve the State of Alabama. That is due to the fact of the crowded condition of the trains that they are regaining some of the business they have lost because of their so-called higher fares.

Now, we have the bus situation——

Commr. Aitchison: Mr. Bruce, where do you get these figures about what they are showing now in the way of gain?

Mr. Bruce: I have them, Mr. Commissioner, they are in the record that I made before the Commission, and the figures that I have submitted come from the Bureau of Statistics of the Commission.

Commr. Aitchison: Does your statement come down simply to the time the taking of testimony was closed?

Mr. Bruce: I didn't hear you, Mr. Commissioner. I have an awful bad cold.

Commr. Aitchison: Does your statement come down simply to the time that the taking of testimony was closed or does your statement apply to the situation as it is today?

Mr. Bruce: I am glad you asked that, Mr. Commissioner, because I am in a position to answer that if you want me to, because I have got the figures.

[fol. 733] Commr. Aitchison: I am asking what your statement was. You told us something with respect to the gain that was going on and you used the present tense, and I wanted to know whether you were speaking as of the time the record was closed?

Mr. Bruce: At the time the record was made I am speaking of, Mr. Commissioner. I am not injecting anything in this record other than what is in the record.

Commr. Splawn: Do you object—and other counsel and the other carriers object—to the stipulation that we might use in these proceedings the monthly reports of the Bureau of Statistics?

Mr. Bruce: No, sir. As a matter of fact, Mr. Commissioner, I would be very glad to stipulate that as far as I am concerned, as far as our case is concerned that the Commission should use the Commission's records in regard to earnings.

Commr. Splawn: Is there any objection on the part of any one to such a stipulation?

Mr. Gwathmey: The railroads very gladly join in such a stipulation.

Mr. Jouralmann: The State of Tennessee joins in that stipulation.

Mr. Winburne: North Carolina joins in that stipulation.

Mr. Marks: Kentucky likewise joins in it.

Mr. Miller: There is no objection on the part of the [fols. 734-905] Price Administrator, either.

Chairman Patterson: Let the record show there is no objection.

Commr. Lee: Does the records show the level of bus fares?

Mr. Bruce: I was just coming to that. The bus fares in Alabama, we made a study of that and submitted an exhibit in the record, Exhibit No. 31 shows what the bus fares are in Alabama. At the present time they are slightly lower than 1.65 cents in the majority of cases.

Commr. Lee: 1.65?

Mr. Bruce: Per mile.

Commr. Lee: As against 2 point what?

Mr. Bruce: No. We still have 1.65 in the State of Alabama. If the Commission should go ahead and grant relief of the carrier in order—I mean permit the carriers to increase their rates to 2.2 cents, then, the bus fares will be approximately 23 to 35 percent lower than the rail fares, and I want to point out to you at the present time—it is in the record, that the buses in Alabama are congested to the point that it is practically impossible to get a seat on them unless you get there very early, and that is due to a condition brought about by the induction of troops,

Mr. Commissioner. All of the selectees that are sent to the various camps where men are inducted in Alabama—and we have three great camps—move on buses, and they get priority,

* * * * * * *

[fol. 906] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 28963

ALABAMA INTRASTATE FARES

Docket No. 29000

KENTUCKY INTRASTATE FARES

Docket No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

Docket No. 29037

TENNESSEE INTRASTATE FARES

PETITION OF THE PRICE ADMINISTRATOR FOR RECONSIDERATION—Filed April 26, 1944

Comes now the Price Administrator, Intervenor in these proceedings, on his own behalf and on behalf of the Economic Stabilization Director, and petitions the Interstate Commerce Commission to reconsider its decision of March 25, 1944, for the following reasons:

[fol. 907] (A) The Interstate Commerce Commission has arbitrarily permitted the railroads of the Southern region to obtain unreasonably high profits by taking undue advantage of wartime conditions to make abnormal increases of coach fares above the *the* level found practicable during peacetimes.

(B) The decision of the Interstate Commerce Commission is an unlawful violation of the reserved constitutional rights and powers of the States of Alabama, Kentucky, North Carolina, and Tennessee, and of the delegated powers of the Alabama Public Service Commission, the Kentucky Railroad Commission, the North Carolina

Utilities Commission, and the Tennessee Railroad and Public Utilities Commission.

(C) Neither the facts of record nor the Commission's findings of basic facts afford any substantial support for the ultimate finding and conclusion that the interstate fares are reasonable.

(D) The Commission erred, as a matter of law and contrary to its own assurances, by failing and refusing to give due consideration to wartime stabilization policy enacted by Congress in Section 1 of the Stabilization Act of October 2, 1942.

(E) The Commission's decision is an unwarranted interference with the cooperation between the President of the United States and the State Commissions in the efforts of the latter to aid in the effective prosecution of the war, as requested of them by the President.

[fol. 908] I. ARGUMENT

A. The Interstate Commerce Commission has arbitrarily permitted the railroads of the Southern region to obtain unreasonably high profits by taking undue advantage of wartime conditions to make abnormal increases of coach fares above the level found practicable during peacetimes.

Intervener respectfully submits that Respondents' own evidence shows that the increase of coach fares from 1.65 to 2.2 cents per mile was not practicable in peacetimes; and that the records in these four cases conclusively show that the increases were and are not necessary for Respondents, but enable them to profit from inflationary wartime conditions which make the increases possible.

To properly understand the situation, one must know the background of the fares.

In 1936 the Interstate Commerce Commission established a maximum fare, for the country as a whole, of 2 cents per mile in coaches, although it found that in 1933 the cost of the services was 2.73 cents per mile for the country, and 3.25 cents per mile in the Southern District. See *Passenger Fares and Surcharges* 214 I. C. C. 174, 180, 266. The Commission justified a maximum fare which would in-

evitably produce deficits upon two principal grounds:[1] [fol. 909] (1) The Commission pointed out (214 I. C. C. 225-228) that freight rates had been established at a level which would support the passenger service.[2] (2) The Commission concluded that the 2 cent fares for the country as a whole would produce the greatest total revenues, although deficits would occur. With respect to Southern carriers the Commission found (214 I. C. C. 255):

> There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower

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[1] With respect to the Southern railroads the Commission outlined the issues from a factual viewpoint as follows (214 I. C. C. 200-201): "What respondents are all seeking is a reasonable fare basis which will produce the greatest amount of revenue. The day when an increase in basic fare was quite certain to produce a corresponding increase in revenue is gone, and it would seem from the record that it may have been even before the general increase of 1920. The problem for this respondent and its southern competitors is, what reasonable fare basis will meet with greatest revenue response from the public?"

[2] In *Fifteen Percent Case, 1937-1938,* (226 I. C. C. 41, the Commission authorized the railroads of the country to make a 10 percent increase in freight rates, and said (p. 54): This deficit in the passenger traffic as a whole has continued from at least 1926, mounting steadily to a peak in 1932, and receding only slightly thereafter. *Passenger Fares and Surcharges,* 214 I. C. C. 174, 182. The interrelation of the freight and passenger traffic has often been commented on by us, and we have declined to the proposition again repeated here by certain protestants that we can authorize no increase in freight rates to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden. *Revenues in Western District,* 113 I. C. C. 3, 22-23; *Fifteen Percent Case, 1931,* 178 I. C. C. 539, 565; compare *General Commodity Rate Increases, 1937, supra.*

rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents.

As stated in the Commission's report (sheets 2 and 5), need for the low fares was due to competition from automobiles and motor busses. In all of the records Respondents' witnesses admitted this fact.[3] Whatever doubt there [fol. 910] may have been as to the revenues possibilities of the 2 cent fares in the South has been removed by the records in these proceedings, for the Southern railroads did try the higher fares for the fourteen months, beginning November 15, 1937. Their conclusion at the end of that trial was that the lower fare produced greater total revenues. This fact was not only admitted in the testimony of Respondents' witnesses,[4] but is also shown by Respond-

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[3] Alabama record, Tr. pp. 11, 98.
Kentucky record, Tr. p. 8.
North Carolina record, Exhibit 1, "page 2", and Tr. p. 58-60.
Tennessee record, Tr. pp. 11, 171-172.

In *Passenger Fares and Surcharges, supra*, the Commission said: "'In the latter year (1920) the average intercity travel of every inhabitant of the country was about 500 miles. In 1929 it was about 2,000 miles, and in 1933, about 1,700 miles, only 130 miles of which were by rail. During the same period the average annual per capita travel by rail dropped from 448 miles in 1920 to 256 miles in 1929 and 130 miles in 1933.'' (214 I. C. C. 183.)

[4] Alabama record, Tr. pp. 17, 98-99.
Kentucky record, Tr. pp. 16, 46-47.
North Carolina record, Tr. p. 60.
Tennessee record, Tr. pp. 20-21, 173.

ents' exhibits from which the following data has been taken. Note the drop in unit revenues in 1938, with the lag in recovery extending into 1939.

13 Alabama Railroads
Docket 28963, Ex. 17, p. 10

	Train Revenue per Passenger Carrying Car Mile
1937	15.72
1938	14.65
1939	14.56
1940	15.41
1941	19.95
1942	36.54

7 Kentucky Railroads
Docket 29000, Ex. 6, pp. 14 & 16

	Revenue per Pass. Miles In Coaches	Revenue per Coach Mile
1937	1.517¢	23.65¢
1938	1.772	21.85
1939	1.482	21.12
1940	1.437	22.66
1941	1.506	29.41
1942	1.686	52.02

[fol. 911]

11 Tennessee Railroads
Docket 29037, Ex. 6, pp. 14 & 16

	Revenue per Pass. Mile in Coaches	Revenue per Coach Mile
1937	1.524¢	21.35¢
1938	1.774	19.15
1939	1.477	18.59
1940	1.446	20.09
1941	1.515	26.66
1942	1.697	48.36

6 North Carolina Railroads
Docket 29036, Ex. 9, pp. 15 & 17

	Revenue per Pass. Mile in Coaches	Revenue per Coach Mile
1937	1.494¢	22.02¢
1938	1.806	19.51
1939	1.395	20.17
1940	1.362	23.30
1941	1.403	30.93
1942	1.560	52.44

In March, 1942, the Commission authorized increases of 6 percent in freight rates and 10 percent in passenger fares, primarily because of increased wage expenses. See *Increases Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545. The State Commissions also authorized these increases, bringing the Southern interstate and intrastate coach fares to the level of 1.65 cents per mile.

Changed conditions resulting from the war, including, as we all know, limitations upon the use of automobiles and increased spending powers, made the increase of Southern coach fares practicable.[5]

[5] See sheet 5 of the Commission's report. In *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 565, the Commission said: "Because of the *abnormal* conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues. * * *" (Emphasis added.)

[fol. 912] On August 1, 1942, the Commission authorized increases of Southern coach fares to 2.2 cents per mile; these increases were published to become effective October 1, 1942.[6]

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[6] On July 14, 1942, the rail carriers in Southern Passenger Association territory filed a petition with the Commission for modification of the order in *Passenger Fares and Surcharges, supra*, seeking authority to increase coach fares in Southern territory to 2.2 cents per mile. On August 1, 1942, the Commission issued an order without prior hearing or report, stating that the petition of the rail carriers was denied; but the order was issued also under *Increased Railway Rates, Fares, and Charges, 1942*, modifying the order in the latter proceeding by authorizing the railroads "to apply the increase of 10 percent approved in said order to a basic fare of 2 cents per mile." The railroads did not notify the Price Administrator of the proposal authorized by the Commission on August 1, 1942, but it was discovered in sufficient time so that the Price Administrator was able to protest the increases published in the carriers' tariff to become effective October 1, 1942. As stated in its report herein, the Commission refused to suspend the rates or to enter upon an investigation to determine the reasonableness thereof.

In October 1942 the Southern railroads followed prescribed procedures to increase intrastate fares to the interstate level. The increases were denied by the Alabama Public Utilities Service Commission, the Railroad Commission of Kentucky, and the Tennessee Railroad and Public Utilities Commission. The North Carolina Utilities Commission has not denied the increases, but deferred action and filed a petition with the Interstate Commerce Commission on July 8, 1943, seeking an investigation by the latter into the reasonableness of interstate passenger coach fares to, from, and within the State of North Carolina. Petitions were then filed by the Price Administrator on July 13, 1943, and by the Alabama Public Service Commission, seeking an investigation into the reasonableness of interstate coach fares in the Southern Region generally. These petitions directed the Commission's attention to the phenomenal and favorable changes in passenger traffic and revenues; but the petitions were denied, without hearing,

[fol. 913] By decision of April 6, 1943, in *Increased Railway Rates, Fares and Charges*, 1942, 255 I. C. C. 357, the Interstate Commerce Commission found that the freight rate increases were not necessary, and ordered their suspension. The passenger fare increases were allowed to remain, however, for reasons stated by the Commission as follows (255 I. C. C. 394):

> The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight.

At about the time the Commission made the above quoted statements, there were in progress phenomenal increases in passenger traffic, which in the South were undoubtedly due to the large number of military camps and establishments. At the hearings in the Kentucky, Tennessee, and North Carolina cases Intervenor submitted testimony and exhibits showing that this change had become so great that passenger operating ratios had become as favorable as the freight operating ratios. From the monthly reports and the 1943 annual reports of Respondents filed with the Commission Intervener has computed operating ratios for 17 [fol. 914] Class I Respondents in these proceedings.[7] For

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by a divided vote of the Commission. The North Carolina Utilities Commission has never closed its doors to continuance to its proceeding, which has been interrupted by this proceeding before the Interstate Commerce Commission.

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[7] See Appendix — to this Petition. An operating ratio is the percentage of operating expenses to operating revenues. Because all of the 17 railroads have not filed their annual reports for 1943, the passenger expenses for them have been estimated according to the formula explained in Inter-

the year 1943 the freight service operating ratio was 58.9 per cent as compared with a passenger ratio of 57.3 per cent.

With such extraordinarily favorable operating ratios, the resulting favorable financial position of Respondents is unavoidable. In Appendix B to this Petition, Intervener has set forth computations of the rates of return for 10 Class I Respondents for the year 1943. Before deductions of federal income taxes this rate of return for all 17 railroads was 16.8 per cent on Intervener's depreciated base, and 12.8 per cent on Respondents' undepreciated base.[8] After deduction of all taxes, the rate of return was 7.4 per cent on Intervener's depreciated base, and 5.8 per cent on Respondents' undepreciated base.

[fol. 915] In the Alabama record, Respondents' Exhibit 17 (page 19) shows that the 1942 rate of return, after all taxes on its undepreciated base was 6.41 per cent for Class I carriers in the Southern Region.

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vener's Exhibits 16, 20 (p. 5), and 13 in the Kentucky, North Carolina, and Tennessee records, respectively. The actual operating ratios for 1936 to 1942, in the four proceedings, and the estimates for parts of 1943, made by Intervener's witness in the three proceedings, are set forth on page 3 of Appendix — to this Petition. A comparison of the estimates with the actual reports to the Commission for 7 of the 17 railroads is set forth on page 2 of Appendix — hereto. Note the conservativeness of the results from the formula, which, was not challenged by Respondents either on cross-examination, on brief, or at oral argument.

[8] The Commission and the Courts have held that depreciation should be deducted from the rate base. See *Charges for Protective Service To Perishable Freight*, 215 I. C. C. 684, 692. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 10. *Minnesota Rate Cases*, 230 U. S. 352, 457-458. *Los Angeles Gas & Electric Corp. v. California R. Comm.*, 289 U. S. 287, 312. *Power Commission v. Hope Gas Co.*, 320 U. S. 591. Note that Exhibits 16 and 20 (p. 8) of the Tennessee and North Carolina records, respectively, show that Respondents' rate base for Class I railroads in the Southern Region was 130.1 per cent of the final value found by the Commission in the *Fifteen Percent Case, 1937-1938*, 226 I. C. C. 41, 161 while Intervener's base would have been 93.1 per cent of the final value.

There is more available data in the Kentucky record. As pointed out in Intervener's brief [9] and Exceptions, the rate of return, for 7 Kentucky Respondents, on Respondents' undepreciated base was 12.78 per cent before deduction of Federal income taxes, and 6.60 per cent after taxes, for the 12 months ended June 30, 1943. Upon Interveners' depreciated base the rates of return were 18.11 before deduction of Federal income taxes and 9.35 per cent after taxes, for the same period. The Railroad Commission of Kentucky estimated the rate of return before Federal income taxes for the full year 1943 as 17.96 per cent.

In the North Carolina record, Intervener's Exhibit 20, page 6, shows a rate of return for 7 North Carolina railroads, before Federal income taxes, of 14.7 percent on Respondents' undepreciated base and of 18 percent on Intervener's depreciated base for the 12 months ended October 31, 1943.

In the Tennessee record Intervener's Exhibit 15 shows a rate of return for 8 Tennessee Respondents, before Federal [fol. 916] income taxes, of 12.8 percent on Respondents' undepreciated base and 18.8 percent on Intervenor's depreciated base for the 12 months ended September 30, 1942.

From the above facts, Intervener draws the following conclusions:

(1) The passenger service is now more profitable than freight service, even though the freight revenues are swelled by the passenger service support factor in freight rates. This fact is shown by the operating ratios.

(2) If rates of return are calculated prior to Federal income taxes, Respondents are undoubtedly earning far more than a fair rate of return, regardless of the rate base which may be used in calculations. The Commission has stated that rates of return should be determined prior to deduction of such taxes, because "railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges ad-

[9] The computations (page 25 of brief) were based on Exhibit 9, sheet 5; Exhibit 12; Exhibit 17; and first 7 pages of Exhibit 19. The estimate of the Kentucky Railroad Commission is set in Exhibit 10.

justed to enable it (them) to retain the designated fair return over and above the tax." *Reduced Rates,* 1922, 68 I. C. C. 676, 683; *Increased Railway Rates, Fares, and Charges,* 1942, 248 I. C. C. 545, 556. Intervener concurs in this rule, and contends that Respondents' fair rates of return should be computed upon the basis of their paying a fair share of wartime taxes from their net income.

(3) Authorizing Respondents to *increase* coach fares on October 1, 1942, and at the same time permitting them to [fol. 917] profit from the support factor in freight rates multiplied by the increase in freight traffic, has resulted in unreasonably high profits for Respondents.

(4) The increase of rates from 1.5 to 2 cents per mile was found by Respondents as not practicable during peacetimes, because of the resulting drop in total passenger revenues. The increase of revenues is now possible only because of wartime conditions resulting from decreased use of automobiles; this fact is admitted by Respondents and stated as fact in the Commission's report.

Therefore, by its decision in these proceedings, the Interstate Commerce Commission has arbitrarily and capriciously disregarded the undisputed facts, and has permitted the railroads of the Southern region to obtain unreasonably high profits by taking undue advantage of wartime conditions to make abnormal increases of coach fares above the level found practicable during peacetime.

B. The decision of the Interstate Commerce Commission is an unlawful violation of the reserved constitutional rights and powers of the states of Alabama, Kentucky, North Carolina, and Tennessee, and of the delegated powers of the Alabama Public Service Commission, the Kentucky Railroad Commission, the North Carolina Utilities Commission, and the Tennessee Railroad and Public Utilities Commission.

Because of the rights reserved to the States by the United States Constitution, the powers of the Federal government do not extend to regulation of intrastate commerce, unless [fol. 918] the conduct of intrastate commerce unduly burdens or injures interstate commerce. This is the doctrine of the so-called Shreveport case, *Houston, E. & W. T. R. Co. v. United States* (1913) 234 U. S. 342. Section 13(4) of

the Interstate Commerce Act expressly provides that the jurisdiction of the Interstate Commerce Commission to prescribe intrastate rates and fares is dependent upon a finding that such rate or fare "*causes* any *undue* or *unreasonable* advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any *undue, unreasonable* or *unjust* discrimination against interstate or foreign commerce." (Emphasis added.)

In that portion of the report entitled "Undue advantage, preference, or prejudice" (sheet 13), the Commission sets forth illustrations of different fares, saying: "all are based upon the fact that the interstate fares are made on the basis of 2.2 cents per mile, while the intrastate fares are based on 1.65 cents per mile." The report then states that the same train services are substantially the same and available to and used by both interstate and intrastate passengers.[10]

The facts stated by the Commission in this portion of its report may show advantage, preference, and prejudice [fol. 919] as between persons and localities; but are such advantage, preference, and prejudice *undue* or *unreasonable?*

The Commission and the Courts have held that disparity between rates and fares does not in itself *cause undue* or *unreasonable* advantage, preference, or prejudice. This fact is pointed out in the dissent of Commissioners Splawn, and Mahaffie who cited Florida v. United States (1933) 282 U. S. 194, in which the United States Supreme Court said:

> The Commission has no general authority to regulate intrastate rates, and the *mere existence of a disparity* between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. (282 U. S. 212; emphasis added.)

As also pointed out by the dissenting Commissioners, there must be a showing of additional facts which would warrant a conclusion that the disparity *caused* something which is

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[10] Intervener does not admit that this last statement is true. The petitions of the States will undoubtedly cover this point in detail.

undue or *unreasonable*, as, for example, adverse affects upon competition between businesses located in border cities. *Railroad Com. of Wisconsin v. Chicago B. & Q. R. Co.*, 257 U. S. 563. See also *Passenger Fares and Charges in Georgia* (1936) 214 I. C. C. 567. In other words, unless there is a showing of injury or adverse effect upon interstate commerce, there is no Federal jurisdiction. No facts showing adverse effects or injury to persons or localities are in this record, nor stated in the Commission's report.

In that part of the report labeled "Unjust discrimination" the Commission estimates the amounts which Re-
[fol. 920] spondents would have received if the proposed interstate fares were in effect. The remainder of this part of the report then discusses the possibility of defeating interstate fares by purchasing intrastate tickets in combination with interstate tickets.

The infirmities of the evidence are apparent from the Commission's admission that the record does not show any particular instances in which interstate fares were defeated. Respondents' witnesses believe that such was the case, but the evidence was admittedly hearsay, and objected to as such. The Commission's findings, if such they be, are, therefore, based on hearsay. In 13th section proceedings the "preference, prejudice, and discrimination must be *real* and *substantial* and proved by *convincing evidence.*" *Passenger Fares and Surcharges in Georgia, supra,* (214 I. C. C. 576; emphasis added). Hearsay evidence did not satisfy this requirement in *Fertilizers and Fertilizer Materials in Mississippi* 191 I. C. C. 413, 421-422.

But even if interstate fares were being defeated, as suggested by the Commission, this evidence is of little importance, since, to the extent that passengers are engaging in such a practice, the effect is necessarily fully reflected in the estimates of revenues which would have been received if the intrastate fares were 2.2 cents per mile.

Of greater importance, however, is the fact that section 13(4) does not forbid discrimination between persons and localities. Only discrimination against interstate or [fol. 921] foreign commerce is forbidden. This distinction is pointed out in *Florida v. United States, supra,* as follows:

> In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the *relation of rates to each other.*

> In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the *relation of rates to income.* (282 U. S. 214; emphasis added.)

In this same case, the United States Supreme Court said:

> As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective program of the act requires that intrastate traffic should pay "a fair proportionate share" of the *cost of maintenance.* (282 U. S. 211; emphasis added.)

That decision was made under section 15a enacted in the Transportation Act of 1920, which contained the so-called "recapture clause" with respect to railroad earnings above a fair rate of return. Upon repeal of the recapture provisions in 1933, the present section 15a(2) as amended in 1940, was enacted. In *Florida v. United States* (1934) 292 U. S. 1, query was raised as to the effect of the statutory change upon the "dove-tail" relation with section 13(4). The court held that there was no change in the previous rule, which it stated as follows (p. 5):

> We concluded that these words in section 13(4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intrastate rates so that intrastate traffic may produce its fare share of the earnings required *to meet maintenance and operating costs* and *to yield a fair return* on [fol. 922] the value of the property devoted to the transportation service, both interstate and intrastate. *United States v. Louisiana,* 290 U. S. 70. (Emphasis added.)

From these excerpts from opinions of the Supreme Court the conclusion is apparent that the Commission has completely misconceived its duty with respect to findings of fact necessary to show the unjust discrimination forbidden by section 13(4). The Commission has based its decision upon discrimination against persons or localities. Discrimination in interstate commerce between persons and localities may be in violation of section 3 of the Act, but

the Commission has no such jurisdiction over intrastate commerce. The discrimination forbidden by section 13(4) is against interstate commerce as a whole, i.e., with respect to the revenues of the carriers.

In its report, the Commission does not even attempt to determine whether the level of intrastate rates will prevent Respondents from making a fair rate of return, although evidence and contentions of the parties in this respect involved one of the principal issues in these cases, as indicated by the foregoing part of this Argument.[11]

The Commission's report shows on its face that Respondents' passenger services have been profitable beginning in [fol. 923] 1942, and hence there is no question but that costs of maintenance and operations are being met, despite the increased expenses of increased traffic which is producing increased revenues. Upon what finding of fact, therefore, can the Commission have based its conclusion in Finding 5, that Respondents require added revenues?

The importance given in the report to the passenger deficits prior to 1942, indicates that the Commission has reached the conclusion that it should require increases of intrastate fares so that carriers may recoup for past losses. If such facts are the basis of the decision, a matter of extremely great importance is involved.

Whether or not the Commission has the discretionary power to increase interstate fares during wartime to compensate for peacetime losses, the fact is clear that the railroads are not absolutely entitled to such recoupment from intrastate fares. The United States Supreme Court has held that "regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings. * * *" *Federal Power Commission v. Natural Gas Pipeline Co.* (1924) 315 U. S. 575, 590. See also *Power Com'n v. Hope Gas Co.* (1944) 320 U. S. 591, 603; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co. v. Railroad Comm. of Georgia*, 262 U. S. 625, 632.

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[11] Rates of return are mentioned in the report with respect to the Kentucky respondents, but the infirmities of this inflated base are pointed out on pages of this petition and in the dissenting report. Note that the Commission did not find that such a rate of return was "fair."

Also ignored by the Commission is the fact that during the years of passenger deficits, these losses were compen-
[fol. 924] sated from a support factor in the freight rates,[12] and this compensation was not included in the amounts set forth in the Commission's report. Furthermore, now that the passenger service is returning profits from its own fares, this unnecessary support is continuing, and has been multiplied by the great increase in volume of freight traffic.

Inherent in the Commission's decision, therefore, is the question whether it has jurisdiction under section 13(4) of the Interstate Commerce Act to increase intrastate rates and fares for the purpose of increasing carriers revenues *above* the *minimum* required by the Constitution and section 15a (2) of the Interstate Commerce Act. The Constitution requires only a fair return to the carrier sufficient to care for the interests of investors. *Power Comm'n Hope Gas Co., supra.* There is nothing in Section 15a (2) specifically requiring even less than a fair return; it requires only "revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such (adequate and efficient transportation) service."

There is no question but that the passenger service has in itself been profitable beginning in 1942; the Commission's report clearly shows that fact. Not having determined whether this profit is less or more than a fair rate of return, as contended by the parties, the Commission has ob-
[fol. 925] viously decided that Respondents are entitled to recoup for passenger services deficits prior to 1942, even though these deficits were compensated from a support factor in the freight rate. Intervener respectfully submits, therefore, that such a decision goes far beyond the requirements of Section 13(4), which contemplates merely the *Removal* of unjust discrimination, not *reparation for supposed losses* during years when there could have been no unjust discrimination because both interstate and intrastate fares were on the same level when the deficits were incurred. Cf. *Atlantic Coast Line R. Co. v. Florida*, 295 U. S. 301.

In considering the report in these proceedings as a whole, therefore, one must conclude that the majority of the

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[12] See *Passenger Fares and Surcharges*, supra, and *Fifteen Per cent Case, 1937-1938, supra.* Note the discussion of these cases on page 4 of this petition.

Interstate Commerce Commission merely has a difference of opinion with the States as to the reasonableness of the remuneration from interstate and intrastate fares. Obviously, in acting on such a basis the Commission has gone beyond the scope of its statutory jurisdiction. In *Florida v. United States, supra,* the United States Supreme Court said (282 U. S. 214):

> But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission.

In respect the Commission should follow its own rule, as stated in *Passenger Fares and Charges in Georgia, supra* (214 I. C. C. 576):

> [fol. 926] The authority to determine the reasonableness per se of intrastate rates or fares rests exclusively with the State authorities. Our power to prescribe them is incidental to the regulation of interstate commerce, and it is not enough for us merely to find that they are not remunerative or reasonably compensatory.

Intervener respectfully submits that the Commission's decision is in violation of section 13(4) of the Interstate Commerce Act, because its finding of *undue* and *unreasonable* advantage, preference, or prejudice is based entirely upon the "mere existence of a disparity" between the interstate and intrastate fares; and because its finding of *unjust* discrimination against interstate commerce is based upon erroneous considerations with respect to discrimination against persons rather than interstate commerce, and upon the erroneous principle that intrastate fares may be increased in order to compensate Respondents for passenger operating deficits prior to 1942, which in fact were already compensated by the support factor in freight rates. Missing from the record and the report are facts showing that the lower intrastate rates *unduly, unreasonably,* or *unjustly* burden or injure interstate commerce. Intervener submits, therefore, that the Commission has exceeded the Federal powers, and that the Federal government has no jurisdiction to this extent.

[fol. 927] C. Neither the Facts of Record nor the Commission's Findings of Basic Facts Afford any Substantial Support for the Ultimate Finding and Conclusion that the Interstate Fares are Reasonable.

Finding 1 of the report states:

> "The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable."

In its report the Commission pointed out that only in the four Southern States is the civilian coach fare less than 2.2 cents per mile, and said: "It is a well settled rule that the most helpful evidence in determining the reasonableness of rates or fares in comparison with other rates or fares for like services."

To the contrary, contrast with this statement the following:

> "Comparisons with other rates in the same or adjacent teritory, while *not a conclusive test* of reasonableness of a rate under investigation, have probative value." *Youngstown Sheet and Tube Co.* v. *United States* (1935) 295 U. S. 476, 480. (Emphasis added.)
>
> "The rates with which comparison is made must be examined in order to determine whether they are proper yardsticks by which to measure the reasonableness of the rates in issue." *Western-Southern Class Rates* (1938) 226 I. C. C. 497, 520-521.

When the level of interstate coach fares was increased to 2.2 cents per mile, effective October 1, 1942, the Commission refused to grant Intervenor's protest and subsequently has refused to consider the reasonableness of the [fol. 928] increased fares, except for the Ex Parte 148 increase of 10 per cent which is not contested in these proceedings. In effect, the Commission has refused to consider the reasonableness of the interstate fares, and then begs-the-question by making the assumption that comparison of the higher and lower fares shows that the higher is reasonable. The absurdity of this logic is apparent: Why

does this comparison not show that the lower fares are reasonable and that the higher fares are unreasonable?

To be recalled in this connection is the fact that except for 14 months from November 15, 1937, to January 15, 1939, Southern coach fares have been on the basis of 1.5 cents per mile since 1933, with the 10 per cent added in 1942. Why not compare the intrastate rates with these prewar interstate rates? The Commission has a rule stated in *Gannett Co., Inc.*, v *Baltimore & O. R. Co.* (1936) 219 I. C. C. 617-618 as follows:

> Where carriers voluntarily maintain a rate between certain points for a long time the presumption is that such a rate is reasonable, and where a long established rate is raised for a short period and then voluntarily reduced to the former basis the presumption is that the advanced rate is unreasonable.

To be remembered is the fact that this rule of comparisons has been developed in the field of freight rates, rather than with respect to passenger fares. The Commission first establishes the general level of class rates upon findings with respect to costs and rate of return, and then uses comparisons for the purpose of properly relating rates on par- [fol. 929] ticular commodities. In this case, however, we have a separate and important service, and the reasonableness of the rate is not a matter of relation with an established reasonable level. A more elemental issue is before the Commission as to the reasonableness of the general level. In such determination of reasonableness, the cost of the service and the carriers' rate of return become of primary importance. The parties in these proceedings submitted evidence or contentions in these respects. Why did the Commission not consider such facts and contentions?

Although Respondents had the burden of proof, they did not submit data showing unit expenses which would indicate costs of the coach service. The dissenting report points out this deficiency, saying (sheets 25 and 26):

> As a matter of fact it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by section 15a.

The demonstration of a more affirmative conclusion of fact than that of the quoted statement is possible by use of figures available for the record to approximate the unit cost of the service and to indicate the probable effect of reducing all interstate and intrastate fares to 1.65 cents per mile.

The data necessary to show costs of operation with any certainty are available only to Respondents, who made no efforts to show such costs. However, Counsel for the [fol. 930] North Carolina Utilities Commission made the following calculations on brief and at the oral argument with respect to data in the Nroth Carolina record:

	1937	1942
Revenues per coach mile (Ex. 9, p. 17)	22.02¢	52.44¢
Multiplied by Operating Ratio (Ex. 9, p. 11)	1.17	.63
Expense per coach mile	25.75¢	33.03¢
Divided by passenger miles per coach mile (Ex. 9, p. 31)	14.74	33.62
Expenses per coach passenger mile	*1.75¢*	*0.98¢*
Intrastate Rate per mile	1.5 ¢	1.65¢

The same computations from the other records show that the passenger coach-mile expenses for Kentucky and Tennessee were 1.97 cents and 1.89 cents for 1937, and 1.24 cents and 1.22 cents for 1942 respectively.[13]

These unit cost figures are more likely to be too high than too low, because coach revenues have increased much more than pullman and parlor car revenues, as stated in the Commission's report (sheet 7), and multiplication by the operation ratio would, therefore, tend to overestimate expenses, particularly as coach mile expenses are less than for pullman and parlor cars as shown in *Passenger Fares and Surcharges, supra* (214 I. C. C. 266). Another calcu-

[13] Kentucky record, Exhibit 6, pp. 10, 16 and 30; Tennessee record, Exhibit 6, pp. 10, 16 and 30; the data was not shown by Respondents in the Alabama record, but most of the Alabama railroads were in the other proceedings, and there is no reason to believe that the data would differ materially.

lation of unit coach-mile costs, for the Southern District [fol. 931] is set forth on page 6 of the Appendix. It shows expenses per coach passenger mile of 1.60 cents for 1937, .88 cents for 1942, and .68 cents for 1943, as compared with the intrastate rate of 1.65 cents and the present interstate rate of 2.2 cents per mile in coaches. This estimate is also likely to be high, as it assumes that expenses for coach operation is equal to the cost of operating the average car in passenger service.

Page 7 of the Appendix shows the probable effect upon revenues of the 17 Respondents, if all coach fares except furlough fares had been at the rate of 1.65 cents per mile during 1943. The result would have been an operating ratio of 64.2 per cent instead of 57.3 per cent. The reduction in income would, of course, result in reduction of taxes, perhaps by as much as 80 per cent of the reduced income. Before taxes, however, the rate of return from the reduced revenues for 1943 would have been 15.4 per cent on Intervenor's depreciated base and 11.7 per cent on Respondents' undepreciated base, compared with actual rates of return 16.8 and 12.8 per cents, respectively. (See page 4 of Appendix.)

Excepting for the post-hearing exhibits filed in the Kentucky case, previously discussed, Respondents rate of return studies were based upon average rates of return from 1921 to 1942, inclusive, and Respondents based their case largely upon the proposition that the level of reasonable rates should be considered over a period of years. The Commission has evidently concurred with this viewpoint to [fol. 932] the extent of permitting Respondents to recoup for passenger deficits prior to 1942. Such reasoning has the following deficiencies.

(1) The Commission arbitrarily and capriciously failed to consider the fact that the support factor from freight rates had compensated for such deficits. There is, therefore, nothing to recoup.

(2) The Commission owes a duty to the general public, under Section 15a (2) of the Interstate Commerce Act, to maintain rates at the "lowest cost" consistent with the furnishing of adequate and efficient service; while, on the other hand, the carriers have no right to a guarantee of any rate of return. (See cases cited on page 19 of this

petition.) In its report the Commission does not consider this aspect of the proceedings, and the report must be regarded as fatally defective because there has not been the required compliance with section 15a (2).

(3) The Commission should have considered the reasonableness of the fares in the light of wartime conditions, particularly with respect to the wartime stabilization program. No *increases* should have been authorized because Respondents do not need the added revenues, and because present rates are not below a reasonable minimum. *Passenger Fares and Surcharges, supra.*

In its report, the Commission described increased expenses and taxes incurred by Respondents during the war. Missing from this statement of facts, however, is the very essential finding whether Respondents need rate increases [fol. 933] to meet these expenses, or whether the great increase in the volume of traffic will actually *reduce unit costs*, so that expenses per ton-mile and per passenger mile are actually lower than during times when expenses were low but traffic light.[14] As indicated by the prior discussion,

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[14] The importance of volume of traffic on unit costs is illustrated by the following statements of the Commission in *Passenger Fares and Surcharges, supra:* "The heavy inroads upon the passenger business of railways resulting, among other things, from the competition of automobiles and motor busses have affected unfavorably the unit costs of the traffic remaining on the rails, and if the volume of rail passenger traffic can again be increased, the unit cost will decline when computed in the manner in which the 1933 cost was computed. Thus, an increase of only 0.79 passenger in the average car occupancy for 1933 of 11.2 in the eastern district would have been sufficient, the average passenger-mile revenue and average journey remaining the same, to eliminate the entire passenger deficit of $11,500,400 for 1933 in that district." (214 I. C. C. 182)

From the Alabama record (Exhibit 40 showing passenger-coach car-miles, revenue passengers carried one mile in coaches) we can compute passenger miles per coach mile for the Southern Region as 30.63 in 1942 and 20.53 in 1941.

Respondents evidence may be analyzed to show that passenger-mile expenses have greatly declined. In failing to make findings in this respect, the Commission's report is deficient, and the decision rests upon unstable basic findings of fact.

[fol. 934] In its report the Commission emphasizes the amounts of Respondents' net revenues after all taxes. Are the railroads entitled to pass along their excess profits taxes and other wartime taxes upon the public? The report does not state any reasons why Respondents are entitled to that previously taken by the Commission in *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545, 556, quoting from *Reduced Rates, 1922*, 68 I. C. C. 676, 683. The effect of these taxes is well illustrated from the Kentucky record. There Respondents admitted that 80 percent of the increase of intrastate rates would be paid to the Federal Government in income taxes.[15] In all of these proceedings, Intervenor has contended that Respondents should bear their fair share of wartime taxes, and should not be permitted to increase rates because of deductions of such taxes from income. The Commission diregarded this contention.

The Commission's report includes a discussion of the trend of railroad revenues, expenses, taxes, and operating income.[16] Using the data for July and December, 1943,

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The other records show the data directly from Respondents' exhibits:

	7 Ky. RR (Ex. 6, p. 30)	6 N. C. RR. (Ex. 9, p. 31)	11 Tenn. RR (Ex. 6, p. 30)
1937	15.60	14.74	14.01
1938	12.33	10.81	10.80
1939	14.25	14.46	12.59
1940	15.77	17.11	13.89
1941	19.53	22.05	17.60
1942	30.85	33.62	28.51

[15] Kentucky record, Tr. p. 122.

[16] The statistics in the regular monthly reports as made to us by the class I. railroads were made a part of the record by stipulation at the oral argument. The latest such reports now on file with and available to us are for the month of December 1943. Compared with the same month in 1942, that month resulted in an increase of 0.2 percent in freight revenue and 32.8 percent in passenger revenue

the Commission points out apparently unfavorable com- [fol. 935] parison of percentages. In doing so the report speaks of declining increases in net railway operating income, and of a steadily declining deficit in net railway operating income percentages over the previous year. The effect of the language is very confusing, and might even lead the casual reader to assume that Respondents are losing money. In simple figures, much easier to understand, the contrary is readily found to be true. The following figures are from the Commission's own reports:

Class I Railroads in Southern Region Earnings
1941 to 1943

(Dollar figures in thousands.)

	1943	1942	1941	Percent Increase over 1943 1942	1941
Revenues	$1,293,756	$1,052,925	$698,243	22.9	85.3
Expenses	753,419	622,964	472,968	20.92	59.3
Operating Ratio	58.2	59.2	67.7		
Net Ry. Op. Income before Fed. Inc. Taxes	442,525	344,975	164,315	28.3	169.3
Federal Income Taxes	244,329	127,261	25,642	92.0	852.8
Net Ry. Op. Income after all Taxes	198,196	217,714	138,673	−9.0	42.9
Net Income before Fed. Inc. Taxes	375,724	253,295	100,487	48.3	273.9
Net Income after all Taxes	131,395	126,034	74,846	4.3	75.6
Passenger Revenues:					
July	24,751	14,189	6,032	74.4	310.3
December	26,750	20,149	8,022	32.8	233.5
Net Ry. Op. Income before Fed. Inc. Taxes:					
July	34,627	31,272	14,898	10.7	23.2
December	25,971	33,383	20,820	−22.2	24.7
Net Ry. Op. Income after Taxes:					
July	14,290	16,262	11,746	−12.1	21.7
December	11,035	28,379	12,516	−61.4	−11.8

for the Southern region and 7.4 and 27.2 percent, respectively, for the country, but in a reduction in net railway operating income from all rail operations of 61.4 percent for the Southern region and 55.9 percent for the country. For the year 1943 the increase over 1942 was 13.3 percent in freight revenue and 67.9 percent in passenger revenue for the Southern region and 14.1 and 60.8 percent, respectively, for the country, but the net railway operating income fell below that for 1942 by 9 and 8.3 percent, respectively. The monthly increases over the corresponding months of the preceding year in the passenger revenues of

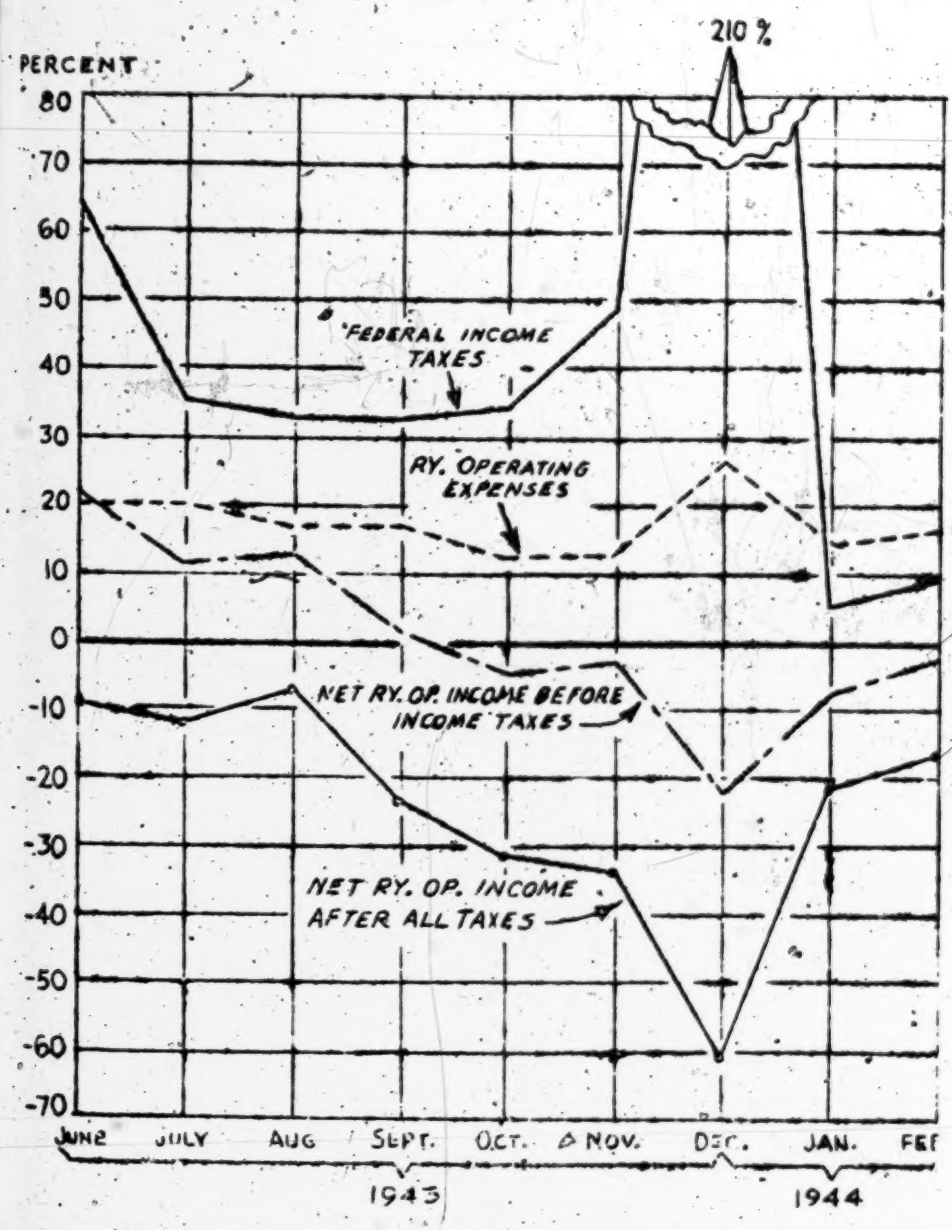
[fol. 936] But even if one wishes to discuss the data in the confusing language of the Commission's report, the fact should be noted that the figures for December 1943 are wholly unsuited for trend comparisons, because in this month the carriers made adjustments for taxes and expenses, particularly retroactive wage awards, properly allocated over the full year. This fact is illustrated by the graph on the next page of this petition.

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the railroads of the country, including those in the Southern region, have been quite steadily declining. Thus, in July 1943 that increase was 74.4 percent for the Southern region and 70.4 percent for the country, and in December of that year it was 32.8 and 27.2 percent, respectively. Also, the net railway operating income has steadily declined from a deficit compared with that for the same month of the preceding year of 12.1 percent for the Southern region and 9.7 percent for the country in July, to 61.4 and 55.9 percent, respectively, for December; so that, due to increased expenses and taxes, the net railway operating income of the railroads in the Southern region dropped from $28,578,717 in December 1942 to $11,035,492 in December 1943. (Sheet 8 of Comm. report.)

(Here follows 1 photolithograph, side folio 937)

CHANGE FROM CORRESPONDING MONTH IN THE PREVIOUS YEAR
EXPENSES, TAXES AND OPERATING REVENUE OF
CLASS I RAILROADS IN SOUTHERN REGION
JUNE 1943 - FEB. 1944



SOURCE: Monthly Reports of ICC, Bureau of Transport Economics and Statistics

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[fol. 937a] Another consideration mentioned in the Commission's report is the mention of discouragement of passenger travel, desired by O.D.T., by means of coach fare increases. These four records contain no support for such findings. So far as data is concerned, the report states (sheet 7) that for the first 10 months of 1943, passenger coach revenues of all class I railroads in the Southern region increased 128.5 percent over the corresponding period of 1942, as compared with an increase of 30.2 percent in parlor and sleeping car revenues. The Commis-
[fol. 938] sion's report also states (sheet 14):

> "An increase in the intrastate fares to the interstate level under existing conditions, respondents insist, will not result in any important loss of traffic to other forms of transportation and will produce increased revenues substantially equivalent to those estimated by them."

This statement is then used in the Commission's specific finding No. 5. Therefore, from these findings of fact, the conclusion is obvious that there will be no discouragement of train travel by the increased fares.

In summary, the Commission's finding with respect to the present reasonableness of interstate fares has no basis in fact, unless the Commission is justified in disregarding the public interest in low cost transportation for the purpose of compensating Respondents for supposed deficits prior to 1942, which in fact were compensated from the passenger service support factor in the freight rates.

On the other hand, the record is full of facts showing that the interstate level is unreasonably high: (1) The comparisons of rate history show that the fare was at the actual and practical peacetime maximum. (2) The peacetime fare is presumably the reasonable maximum. (3) The unit cost of the service is far below the 1.65 cent fare. (4) Respondents are earning far more than a fair return. (5) The passenger service support factor, multiplied by increased traffic, either should satisfy any need for recoupment of revenues, if recoupment is justified; or the revenues from the support factor are resulting in unrea-
[fol. 939] sonably higher revenues which are wholly unnecessary, because the passenger services are now as profitable, or more profitable, than the freight services.

Therefore, Intervenor contends that neither the facts of record nor the Commission's findings of basic facts afford any substantial support for the ultimate finding and conclusions that the interstate fares are reasonable.

The Commission's error is due to its disregard of changed conditions resulting from the war, in order to adhere to its 1936 decision in *Passenger Fares and Surcharges, supra*, to which 10 percent increases were added in *Increased Railway Rates, Fares, and Charges, 1942, supra*. Intervenor respectfully submits that the Commission has failed in its duty to the public as required by section 15a, by not giving effect to these phenomenal changes in coach traffic.

[fol. 940] D. The Commission Erred as a Matter of Law and Contrary to Its Promises, by Failing and Refusing to Give Due Consideration to Wartime Stabilization Policy Enacted by Congress in Section 1 of the Stabilization Act of October 2, 1942.

Section 1 of the Stabilization Act directs the President of the United States to stabilize prices "so far as practicable * * * on the basis of levels which existed in September 15, 1942." The President was then directed to provide for adjustment in such prices "to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities." A proviso immediately follows:

> Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase.

In proceedings since the enactment of this proviso, the Interstate Commerce Commission has frequently stated, as it does in the instant report (sheet 18), that the provisions of the Price Control and Stabilization Acts, "except those pertaining to the giving of notice and consent to intervene to the designated Federal agent, made no changes in or additions to the Interstate Commerce Act

with respect to the rates, fares, and charges of common carriers by railroad."

Intervenor concedes that the Price Control and Stabilization Acts do not limit the powers of the Commission under [fol. 941] the Interstate Commerce Act. Cf. *Vinson* v. *Washington Gas Light Co.*, — U. S. — (decided March 27, 1944). Intervenor merely requests that the Commission exercise its powers under the Interstate Commerce Act consistently with its statements in *Increased Railway Rates, Fares, and Charges*, 1942, 255 I. C. C. 357, 392-393:

> The Interstate Commerce and the Price Control and Stabilization Act declare important congressional policies which are not contradictory, but are complementary. In the administration of the Interstate Commerce Act, we give consideration, when applying the standards of lawfulness of charges made under that act, to the fact that for a Nation at war a major problem is to prevent undue inflation of prices.

If, in stating that the Price Control and Stabilization Act made no changes or additions to the Interstate Commerce Act, the Commission implied that it was free to disregard the policies embodied therein, it erred, as a matter of law, because, as the United States Supreme Court has recently said, in *Southern S. S. Co.* v. *National Labor Relations Board* (1942) 316 U. S. 31, 47; 62 S. Ct. 886, 894:

> Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Again in *McLean Trucking Co.* v. *United States* (1944) 64 S. Ct. 370, 377, the Supreme Court stated:

> But in executing these policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot without more — ignore the latter. The precise adjustment which it must make, however,

> will vary from instance to instance depending on the extent to which Congress indicates a desire to have [fol. 942] those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned.

Intervenor's concept of the policies of the Price Control and Stabilization Acts [15] applied to common carriers, is as follows:

> (1) Common carriers should be permitted to earn revenues sufficient to enable them to furnish adequate and efficient services during the war. This is true because such services are necessary to the effective prosecution of the war.
>
> (2) Common carriers should not be authorized to increase rates, fares, and charges above the reasonable minimum unless added revenues are necessary. In *Passenger Fares and Surcharges, supra*, the Commission found that Southern coach fares of 1.5 cents per mile were reasonable.
>
> (3) Common carriers, if permitted to earn high profits and to recoup for prewar deficits when possible from favorable results of increased volume of traffic at rates and fares in effect on September 15, 1942, should certainly not be permitted to take advantage of [fol. 943] inflationary wartime conditions to make *increases* of rates, fares, and charges not presently necessary.

The complementary nature of these policies with those of the Interstate Commerce Act are readily apparent. Section 15a (2) of that Act provides, in part, as follows:

> In the exercise of its power to prescribe just and reasonable rates the Commission *shall* give due consideration, among other factors • • • to the need, *in the public interest*, of adequate and efficient railway

[15] For an analysis of the wartime stabilization program and its policies see *Lincoln Sav. Bank of Brooklyn* v. *Brown*, 137 F. 2d 228; *United States Gypsum Co.* v. *Brown*, 137 F. 2d 360; *Philadelphia Coke Co.* v. *Bowles*, 139 F. 2d 349.

transportation service at the *lowest cost* consistent with the furnishing of such service; and to the *need of revenues* sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (Emphasis added.)

The above two factors specified by section 15a (2) are also the principal requisites in any determination of just and reasonable rates. The United States Supreme Court has stated; "The rate-making process under the (Natural Gas) Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and consumer interests." *Power Comm'n* v. *Hope Gas Co., supra*, 320 U. S. 591, 603.

During this war, except for common carrier and public utility rates, consumers interests in prices are largely in the hands of the Economic Stabilization Director and the agencies associated with him in the stabilization program, including the Office of Price Administration. For this protection of consumer interests, Congress has established general policies, set forth in the first sections of the Price Control and Stabilization Acts. Intervenor contends that [fol. 944] the Commission, an agency of Congress, should, in its consideration of the policy requirements specified by Congress in section 15a (2) of the Interstate Commerce Act, include within such consideration the relation of the Congressional policies of the Price Control and Stabilization Acts. *Jersey City* v. *Hudson & M. R. Co.*, (unreported).

In *Increased Railway Rates, Fares, and Charges, 1942, supra*, the Commission said (255 I. C. C. 392):

> We recognize the congressional objectives of the Price Control and Stabilization Acts to prevent inflation during the present emergency, and in the administration of those statutes the Director of Economic Stabilization and the Price Administrator will have our cooperation.

Intervenor respectfully requests that the Commission fulfill its promise in this proceeding.

E. The Commission's Decision is Unwarranted Interference with the Cooperation Between the President of

the United States and the State Commissions in the Latters' Efforts to Aid in the Effective Prosecution of the War, As Requested of Them by the President.

In his "Hold-the-Line" order of April 8, 1943, 8 F. R. 4681, the President of the United States stated:

> 4. The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program.

[fol. 945] In the exercise of its powers, the Kentucky Railroad Commission gave in its decision, as one ground for denial of the increases, this request for cooperation in the wartime stabilization program.[16] Intervener appeared in all four State proceedings as a Protestant. Therefore, in these proceedings we have four States acting according to the request of the President of the United States, the Economic Stabilization Director, and the Price Administrator, consistently with a general policy established by Congress as necessary to aid in the effective prosecution of the war. If the Interstate Commerce Commission adheres to its present decision, it will be obstructing this cooperative program and policy.

Under records of facts which contain all of the doubts pointed out by the dissenting opinion, should the Interstate Commerce Commission, an agency of Congress, frustrate this cooperation by pushing aside the wartime stabilization program of Congress as a consideration not to be taken into account? Certainly it will not if it gives effect to the fundamental principle that it should not interfere with the exercise of State powers unless the justification shall "clearly appear" and shall "conform to a high standard of certainty." *Florida* v. *United States*, *supra* (282 U. S. 219), *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493.

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[16] Kentucky record, Exhibit No. 2, pp. 10-12, inclusive.

Intervener respectfully submits that the records and the Commission's report in these proceedings do not show any clear and certain justification for the Commission's interference with the State Commission's cooperation in the [fol. 946] effective prosecution of the war in accordance with the wartime stabilization program.

Conclusion

In summary, Intervenor submits that in 1943 Respondents were earning more than a fair rate of return; that their increases of coach fares since September 15, 1942, resulted and will result in unreasonably high profits from unreasonably high fares which are possible only by taking undue advantage of wartime conditions; that the Commission's approval of such increases is contrary to the policy of section 15a (2) of the Interstate Commerce Act and the complementary policies of the Price Control Act and Stabilization Act; that the Commission's decision in these proceedings is in violation of the reserved constitutional rights of the States of Alabama, Kentucky, North Carolina, and Tennessee, and is unwarranted interference with the cooperation of the duly authorized State Commissions of those States in the President's program for the effective prosecution of the war.

[fol. 947] Intervener respectfully requests that the Commission reconsider its decision of March 25, 1944, and hold that these records do not contain any clear and certain justification for the exercise of Federal jurisdiction.

Respectfully submitted, Chester A. Bowles, Price Administrator; Richard H. Field, General Counsel; Bernard M. Fitzgerald, Transportation Counsel; David F. Cavers, Assistant General Counsel; Warren Price, Jr., Chief Counsel, Common Carrier Section; M. D. Miller, Attorney.

Certificate of Service

I hereby certify that I have served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at Washington, D. C., this 26th day of April, 1944.

M. D. Miller, Attorney.

[fol. 948]

APPENDIX—Page 1

17 Southern Railroads

Revenues, Expenses and Service Operating Ratios
1943

Respondent	Total Operating			Freight Service Assigned			Passenger Service Assigned		
	Revenues (thousand dollars)	Expenses	Operating Ratio (%)	Revenues (thousand dollars)	Expenses	Operating Ratio (%)	Revenues (thousand dollars)	Expenses	Operating Ratio (%)
1 Ala. G. S.	23,538	12,254	52.1	17,768	9,730	54.8	5,770	2,524	43.7
2 A. B. C.	7,211	5,312	73.7	6,374	4,392	68.9	837	920	109.9
3 A. C. L.a	153,601	81,783	53.2	103,858	54,285	52.3	49,743	27,497	55.3
4 Cent. Ga.	38,930	23,180	59.5	27,828	17,107	61.5	11,102	6,070	54.7
5 C. & O.a	208,513	115,045	55.2	182,836	95,579	52.3	25,677	19,467	75.8
6 C. N. O. & T. P.	37,214	19,764	53.1	28,643	15,505	54.1	8,571	4,259	49.7
7 Clinchfield a	12,797	6,202	48.5	12,583	5,964	47.4	214	238	111.2
8 G. M. & O.a	37,859	24,720	65.3	34,634	22,030	63.6	3,213	2,679	83.4
9 I. C. (incl. Y. & M. V.)	247,637	159,790	64.5	200,349	127,512	63.6	47,288	32,278	68.3
10 L. & N.a	208,799	118,152	56.6	154,592	90,459	58.5	54,207	27,694	51.1
11 N. C. & St. L.a	42,284	26,459	62.6	31,696	20,490	64.7	10,588	5,969	56.4
12 Norfolk-So.a	8,378	6,182	73.8	7,972	5,595	70.7	466	587	126.0
13 SL-SF	107,427	71,055	66.1	78,495	54,552	69.5	28,932	16,504	57.0
14 SAL	137,258	80,824	58.9	89,339	54,920	61.1	47,419	25,904	54.6
15 Southern	245,532	136,604	55.6	177,020	101,633	57.4	68,512	34,971	51.0
16 Tenn. Cent.	4,842	3,436	71.0	4,071	2,824	69.4	771	612	79.4
17 W. of A.	5,342	3,106	58.1	3,314	2,333	69.8	1,998	773	38.7
Total 17 Southern Roads	1,527,162	893,868	58.5	1,162,788	684,910	58.9	364,362	208,946	57.3

a Revenues and expenses assigned to passenger and freight services from 1943 annual report to the I. C. C.

[fol. 949]

APPENDIX—Page 2

Comparison of 1943 Actual and Estimated Service Operating Ratios, From Available 1943 Annual Reports

	Actual		Estimated	
	Passenger	Freight	Passenger	Freight
A. C. L.	55.3	52.3	53.1	53.3
C. & O.	75.8	52.3	75.9	52.3
Clinchfield	111.2	47.4	119.3	47.2
G. M. & O.	83.4	63.6	95.7	62.5
L. & N.	51.1	58.5	52.6	58.0
N. C. & St. L.	56.4	64.6	60.0	63.4
St. Louis-San Francisco	57.0	69.5	60.7	68.1
Total 7 Roads	58.0	57.4	58.9	57.1

[fol. 950]

APPENDIX—Page 3

Operating Ratios

Ratios shown by Exhibits introduced at Hearings

12 Alabama Railroads			10 Kentucky Railroads			8 Tennessee Railroads			7 North Carolina Railroads		
Docket 28963, Ex. 17, p. 16			Docket 29000, Exs. 13 and 14			Docket 29037, Ex. 13			Docket 29036, Ex. 20, p. 4		
	Passenger	Freight		Passenger	Freight		Passenger	Freight		Passenger	Freight
1936	126	67	1936	131.4	56.6	1936	123.8	63.7	1936	123.6	60.0
1937	121	69	1937	127.5	60.1	1937	118.1	66.5	1937	120.9	62.6
1938	128	68	1938	135.3	60.3	1938	114.8	64.4	1938	130.2	63.4
1939	128	66	1939	135.5	58.1	1939	115.7	62.9	1939	128.5	60.2
1940	127	67	1940	136.8	57.9	1940	127.4	63.5	1940	127.1	60.3
1941	107	62	1941	118.5	57.4	1941	110.0	59.8	1941	103.7	57.0
1942	68	58	1942	75.2	54.9	1942	72.5	57.2	1942	63.9	54.7
1943—The Commission's report states: "The passenger operating ratio of 1943 was lower than for 1942."			1st. 60 mo. 1943 (est.)	61.0	55.8	1st. 9 mo. 1943 (est.)	56.0	58.6	1st. 9 mo. 1943 (est.)	52.3	54.7

[fol. 951]

APPENDIX—Page 4

Rates of Return

17 Southern Railroads
(Dollar figures in thousands)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
		Rate Base		Prior to Deduction of Federal Income Taxes				After Taxes			
Proceeding*	Respondent	Intervenor's December 31, 1942	Respondents December 31, 1942	Net Ry. Op. Income 1943	Net Ry. Op. Inc. less Rent for Leased Roads 1943	1943 Rate of Return on Intervenor's Base	1943 Rate of Return on Respondents Base	Net Ry. Op. Income 1943	Net Ry. Op. Inc. less Rent for Leased Roads 1943	1943 Rate of Return on Intervenor's Base	1943 Rate of Return on Respondents Base
1 AT	Ala. G. S.	$36,284	$42,150	$9,196	$9,176	25.3%	21.8%	$3,001	$2,981	8.2%	7.1%
2 A	A. B. C.	6,705	8,493	1,042	1,042	15.5	12.3	515	515	7.7	6.1
3 ANT	A. C. L.	276,406	320,954	58,205	57,997	21.0	18.1	15,705	15,497	5.6	4.9
4 AT	Cent. Ga.	92,008	114,012	13,041	11,657	12.7	11.4	7,346	5,962	6.5	6.4
5 K	C. & O.	515,112	633,644	86,160	86,110	16.7	13.6	37,216	37,166	7.2	5.9
6 KT	C. N. O. & T. P.	55,235	90,306	15,435	15,410	27.9	17.1	6,441	4,704	8.5	7.1
7 KNT	Clinchfield	8,741	74,966	5,929	3,756	43.0	7.9	5,233	3,060	35.0	7.0
8 AKT	G. M. & O.	71,263	86,291	8,726	8,236	11.6	10.1	5,919	5,429	7.6	6.9
9 AKT	I. C. & Y. & M. V.	338,833	701,120	65,526	64,024	18.9	9.3	38,222	36,720	10.8	5.5
10 AKNT	L. & N.	408,021	519,307	81,790	81,488	20.0	15.7	25,513	25,211	6.2	4.9
11 AKT	N. C. & St. L.	57,962	73,025	13,179	12,375	21.4	18.0	5,083	4,279	7.4	7.0
12 N	Norfolk-So.	19,195	21,806	1,308	1,235	6.4	6.0	943	870	4.5	4.3
13 AT	SL-SF	379,287	432,191	30,360	30,246	8.0	7.0	22,489	22,475	5.9	5.2
14 AN	SAL	264,760	346,972	44,704	44,123	16.7	12.9	28,704	28,123	10.6	8.3
15 AKNT	Southern	538,522	653,509	92,368	89,372	16.6	14.1	35,745	32,749	6.1	5.5
16 T	Tenn. Cent.	8,412	9,546	1,000	975	11.6	10.5	712	687	8.2	7.5
17 A	W. of A.	7,055	10,905	1,854	1,854	26.3	17.0	660	660	9.4	6.1
Total 17 Southern Roads		$3,083,801	$4,139,197	$529,823	$519,176	16.8%	12.8%	$239,447	$227,088	7.4%	5.8%

* Symbols A, K, N, and T mean that the named railroad was a respondent in the Alabama, Kentucky, North Carolina, or Tennessee proceeding, respectively.

Sources on the following page.

[fol. 952]

Source—Respondents Monthly and Annual reports to the Interstate Commerce Commission:

Column 1—Schedule 211N—Annual Reports.
2—Accounts 701, 702, 702½, 708, 716 less 775, 775½, 776, 776½—Annual Reports.
3—I. C. C. Revenue and Expense reports for 1943.
4—Column 3 less rent for Leased Roads from I. C. C. Income and Balance Sheet reports for 1943.
5—Column 4 divided by Column 1.
6—Column 3 divided by Column 2.
7—Same as Column 3.
8—Same as Column 4.
9—Column 8 divided by Column 1.
10—Column 7 divided by Column 2.

[fol. 953]

Estimate of Unit Costs per Coach Passenger Mile

Class I Railroads Southern District

1937–1943

	(1) Expenses Assigned to Passenger Service ($000)	(2) Passenger Car Miles (000)	(3) Passenger Miles in Coaches (000)	(4) Passenger Coach Miles (000)	(5) Expense per Passenger or Coach Car Mile (cents) (1)/(2)	(6) Coach Passenger Miles per Coach car Mile (3)/(4)	(7) Expense Coach Passenger Mile (cents) (5)/(6)
1937	118,150	517,936	2,085,307	146,443	22.81	14.24	1.60
1938	112,356	488,296	1,433,328	132,193	23.01	10.84	2.12
1939	113,939	495,193	1,782,977	135,339	23.01	13.17	1.75
1940	122,171	514,512	2,219,753	143,285	23.75	15.49	1.53
1941	134,730	563,619	3,332,005	166,846	23.90	19.97	1.20
1942	174,303	667,340	6,599,090	223,290	26.12	29.55	.88
1943	219,337*	792,387	12,177,590	296,995*	27.68	41.00	.68

* Estimated.

Source: I. C. C. Statistics of Railways in the U. S.

[fols. 954–961]

APPENDIX—Page 7

Effect of Reduction of All Southern Coach Fares to 1.65 cents per mile

17 Southern Railroads

1943

Computations

	Coach Passenger-Miles	Revenues
Total, 1943	10,750,784,000	$192,496,971
(From Reports To Commission)		
Furlough fares (12% @1.25¢ per mile. See Ala. record, Ex. 27)	1,290,098,000	16,126,225
Non-furlough fares	9,460,686,000	$176,370,746
Revenue per passenger-mile, coaches, non-furlough		1.864¢

The average revenue per passenger-mile, non-furlough, at the rate of 1.65 cents per mile would be 1.4¢, because 1.65¢ is 75% of 2.2 cents (i. e., 1.4¢ is 75% of 1.864¢); note also the correlation of this figure with those on pages 5 and 6 of this petition). The difference between the revenues of the two fares would be .464¢, which, multiplied by non-furlough coach passenger-miles of 9,460,686,000, indicates probable reduction in revenues of $43,897,583, which would have the following effect upon the carriers revenue status:

Total Passenger Revenues, 1943	$364,362,000
Reduction	43,897,583
Reduced Revenues	320,464,417
Passenger Expenses, 1943	208,946,000
1943 Operating ratio at reduced revenues	65.2%
Compare, 1943 Operating ratio (p. 1 of this Appendix)	57.3%

[fol. 962] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 29036

North Carolina Intrastate Coach Fares

PETITION FOR EXTENSION OF 30-DAY PERIOD WITHIN WHICH TO ADJUST CERTAIN INTRASTATE FARES; FURTHER HEARING TO RECEIVE SUPPLEMENTAL STATISTICAL EVIDENCE; MODIFICATION OF CERTAIN FINDINGS; REARGUMENT; AND RECONSIDERATION—Filed April 27, 1944

Petitioners:

Petitioners are the North Carolina Utilities Commission, Charlotte Shippers & Manufacturers Association, Inc., and the North Carolina Division of the Travelers Protective Association of America, parties to the above-entitled proceeding, and hereinafter referred to for convenience as "North Carolina."

The Four Consolidated Cases:

The North Carolina Case, No. 29036, was consolidated for oral argument with three other related state intrastate fares cases, namely, the Alabama Case, No. 28963, the Kentucky Case, No. 29000, and the Tennessee Case, No. 29037. The cases were decided March 25, 1944.

The Report of the Federal Commission in the four consolidated cases, cited as Alabama Intrastate Fares, was served on or about March 29, 1944.

[fol. 963] The Section-13 Finding:

The Federal Commission's Report's six numbered findings are briefly that: (1) the interstate coach fares through the Four States are just and reasonable; (2) the intrastate fares are lower than the interstate fares; (3) the conditions affecting the transportation of passengers in coaches within the Four States in intrastate commerce are substantially similar to those in interstate commerce through those states; (4) interstate passengers are prejudiced and intrastate passengers are preferred by the lower intrastate fares; (5) traffic moving under the lower intrastate fares is not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation

service; and (6) the maintenance of the lower intrastate fares causes preference to persons in intrastate commerce and prejudice against persons in interstate commerce, and unjust discrimination against interstate commerce; and the unlawfulness should be removed by increasing the intrastate fares to the interstate level for like accomodations for like distances.

The Federal Commission's Report states that the six numbered findings are without prejudice to the right of the authorities of the affected states, or any interested party, to apply for modification thereof as to any specific intrastate fare, and leaves to the railroads and the Four State Commissions the matter of adjusting the intrastate fares to conform to the six numbered findings; and, if not accomplished within 30 days from the service of the report, consideration will be given to the entry of an appropriate order.

In other words, unless the Four States authorize the railroads to increase the intrastate fares to the interstate basis within 30 days the Federal Commission will consider the entry of Section-13 Orders.

[fol. 964] In view of the two procedural paragraphs at the conclusion of the Federal Commission's Report, North Carolina finds it necessary to present, at this stage, its petition (a) for an extension of at least 30 days of the 30-day period within which to arrange with the railroads certain contemplated adjustments in the intrastate fares; (b) for further hearing, to receive certain supplementary statistical evidence to complement certain statistics which appear in the Federal Commission's Report and which were not available at the time of the hearing in December 1943, and were not available when North Carolina's Brief was filed; (c) for opportunity to present Exceptions to findings of fact, in the Federal Commission's Report, and Exceptions to the failure to make specific findings of fact as requested in North Carolina's brief; (d) for opportunity to argue certain points of law upon which, in the opinion of North Carolina, the Federal Commission erred; and (e) for reconsideration and reversal of the Section-13 findings.

A. Extension of 30-day Period for Adjustment of Intrastate Fares

The testimony adduced by the railroads before the North Carolina Commission in support of their application "indi-

cated that certain of the weaker lines did and probably could have justified an increase in rates on the basis of revenue." (Testimony of Judge Hunter, p. 173). "The North Carolina Commission's order rather clearly indicated that some of the lines, particularly the Norfolk Southern and Clinchfield, were, under the evidence, entitled to an increase." (Mr. Nicholson, tr. 186). "They were told it would be necessary to file a simple informal application, setting forth their needs, but they have not done that." (tr. 186).

[fol. 965] In view of the finding in the Federal Commission's Report that the Carolina, Clinchfield and Ohio Railway and the Norfolk Southern Railway had incurred deficits from passenger operations in 1942 of $84,999 and $134,600, respectively, (bottom of sheet 5), the North Carolina Commission recently has requested that these carriers furnish to the North Carolina Commission statements of their respective net railway operating incomes, and net railway operating incomes or deficits from passenger operations for the years 1942 and 1943, in order that the North Carolina Commission, in the proceding before it (which is still open) may further consider whether the carriers' application should be granted as to these particular carriers. After such statistical evidence is furnished by the Weak Roads, the North Carolina Commission will again review the record before it, as to these two carriers.

Similarly, the Strong Lines in North Carolina have been requested, since the receipt of the Federal Commission's Report, to furnish certain statistical facts relating to their respective passenger coach operations in order that the North Carolina Commission may again review the evidence before the North Carolina Commission in the light of the findings of the Federal Commission.

As soon as the North Carolina Commission's action thereon can be announced, the North Carolina Commission will advise the Federal Commission whether or to what extent the carriers will be authorized by the North Carolina Commission to adjust their intrastate fares to the interstate level.

More than the 30-day period, named in the Federal Commission's Report, will be required to complete these procedural steps within a reasonable time.

[fol. 966] North Carolina asks that the Federal Commission *extend the 30-day period, within which to adjust the intrastate fares to the interstate level, to 60 days.*

B. Further Hearing, to Receive Supplementary Statistical Evidence

On sheet 7 of the Federal Commission's Report is the statement that "for the first *10 months of 1943*, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument, the increase in the passenger coach revenues of these carriers (Tennessee) over those for the corresponding period of 1942 was 128.5%, as compared with an increase of 30.2% in the parlor and sleeping-car revenues".

It is now not clear just what statistics were to be covered by that stipulation, which was made at the oral argument at the suggestion of the Federal Commission. North Carolina understood that the Federal Commission thereby would be able to incorporate in its report any regularly reported railroad statistics for the complete year 1943, so as to supplement and complete the statistics of various parties of record which included only the monthly reports which were available to the parties during the course of the Four State proceedings before the Federal Commission.

Some of the statistics were for the first six months of 1943, others for the first nine months, others for the first 10 months of 1943, and others for the 12 months ended with October 31, 1943. The Federal Commission's Report contains some statistics for these part-year periods, and some for the complete year of 1943. In some instances comparable statistics for 1943 or any of the part-year periods, were omitted from the Federal Commission's Report.

[fol. 967] For example, the Federal Commission's Report fails to state what were the passenger operating ratios of the North Carolina lines for 1943 (top of sheet 6), but finds that the passenger operating ratio of the 12 Alabama respondents in 1943 was lower than for 1942, without showing how much lower, or what the ratio was. (Sheet 6, next to bottom paragraph.)

The Federal Commission's Report shows rather complete statistics for the year 1942, and varying and incomplete statistics for the year 1943, although the monthly

reports for each of the 12 months of 1943 were available and availed of by the Federal Commission in reaching its decision. This is borne out by the Commission's reference, on sheet 8, first paragraph, to the statistics for the month of December 1943. There the Federal Commission particularly stressed the comparison of statistics for the month of December 1943 with December 1942,—an abnormal and atypical month.

The use, by the Federal Commission, of complete statistics for numerous years prior to the War, and the use of only one complete War-year—1942 and some incomplete statistics for 1943, or parts of 1943, when the statistics for the second War-year (1943) were available to the Federal Commission by stipulation, results in comparisons which are involved, and difficult to visualize, and withholds from clear view the fact that respondents' passenger operating ratios in 1943 were even more favorable to them than in the first War-year, 1942. The Federal Commission's involvment of the statistics in this way lends itself to unfair and incorrect inferences and deductions. North Carolina seeks to clarify such involvement of the statistics in the Federal Commission's Report by a recasting of the statistics in a clear manner in order that fair and correct inferences [fol. 968] and deductions may be drawn therefrom and incorporated in the Federal Commission's Report.

Attention is directed to the fact that the Federal Commission has used statistics for the month of December 1943, which is the month during which the hearing was held in the North Carolina Case, I. C. C. No. 29036. No proposed Report was issued in No. 29036, and no Reply Briefs were permitted. North Carolina had no means of knowing that the Federal Commission would use and stress the statistics of the atypical month of December 1943; and North Carolina had no opportunity to offer any evidence in rebuttal of the statistics which appeared for the first time in these proceedings in the Federal Commission's Report.

North Carolina seeks opportunity to rebut the statistics of December 1943, which were employed by the Federal Commission, and the inferences drawn therefrom, by the presentation of like statistics for the complete year 1943, and for the latest available monthly reports for 1944. North Carolina will show that the subsequent statistics offset and negative the incorrect inferences drawn by the Federal Commission from the December 1943 statistics.

North Carolina will show, for example, that the Commission in discussing the month of December 1943 on sheet 8 of its Report stated that:

> "The net railway operating income has steadily declined from a *deficit* compared with that for the same month (July) of the preceding year of 12.1% for the Southern region * * * to 61.4% * * * for December".

The use of the word "deficit" conveys an entirely erroneous meaning. The roads did not suffer a *deficit* in net railway operating income. The comparison made was that of a *decrease*, one month compared with the same month of the preceding year. It is error, in comparing months, to describe the *decrease* as a *deficit* in net railway operating income.

[fol. 969] North Carolina will show from I. C. C. statement M-100 for the 12 months ended with December 1943 and 1942 that the roads in the Southern region instead of incurring a *deficit* in net railway operating income, as stated by the Commission, earned, on the plus side of the ledger, a net railway operating income of $198,222,195 and that the operating ratio of expenses to revenues in 1943 was 58.2 which is better than 59.2 in 1942.

These figures will correct the very erroneous impression to be gained from the Commission's report in discussing deficits in net railway operating income and the drop from Twenty-Eight Million in December 1942 to Eleven Million in December 1943.

Statement M-100 for January 1944 shows that the carriers' net railway operating income in January 1944 was $14,411,720 or more than Three Million Dollars greater than the figure shown in the Commission's report for December 1943 of $11,035,492.

Statement M-100 December 1943 shows that railway operating expenses of the roads in the Southern region were $79,033,667 and that the expenses were considerably less in January 1944, viz., $67,567,498. The operating ratio was 69.4 in December 1943 and 61.9 in January 1944.

North Carolina does not suggest the selection or use of any one month, but offers these statistics for the purpose of showing that the statements in the long paragraph commencing on sheet 8 of the Commission's Report as to

December 1943 are incorrect and create an erroneous and unfair impression.

North Carolina asks that further hearing be held in order that opportunity be given to the parties to present supplementary statistical evidence, particularly for the complete [fol. 970] *year 1943 and the latest available months of 1944, so as to clarify and complement the incomplete and confusing statistics which the Federal Commission incorporated in its report, and to rebut the inferences drawn therefrom by the Federal Commission.*

C. Exceptions to Findings of Fact and Exceptions to the Failure to Make Specific Findings Requested in North Carolina's Brief

North Carolina has had no previous opportunity to take exception to findings of fact and omission of facts in the Federal Commission's Report. North Carolina was denied the opportunity of taking Exceptions to a Proposed Report of an Examiner. Proposed Reports were issued in the Alabama Case and the Tennessee Case, but that *usual* method of I. C. C. procedure was denied to North Carolina.

In the Tennessee and Alabama Cases the States had opportunity to file Replies to Exceptions of other Parties, but no such right was accorded to North Carolina in the North Carolina Case.

North Carolina was even denied the right, under the Commission's Rules of Practice, to file a Reply to the Railroads' Brief in the North Carolina Case (tr. 243) although Rule 93 specifically provides that Reply Briefs may be filed where no Officer's Report is served.

Therefore North Carolina is entitled, under this combination of circumstances, to careful and detailed consideration by the Federal Commission of its initial Exceptions hereinafter set forth. Unless such consideration is accorded to North Carolina's Exceptions, North Carolina will have been denied the right to a *full hearing*.

[fol.971] No Person Complained of the Intrastate Fares

Exception is taken to the failure to find, at the bottom of the second paragraph on sheet 2 of the Report that no person, firm, corporation or association representing travelers for hire complained of the intrastate fares in any of the Four States.

The omission of this fact is important in that, in the total absence of any such complaint or evidence by paying travelers, there is no legal foundation to support the Federal Commission's numbered Finding No. 6, that the lower intrastate fares cause advantage "to persons in intrastate commerce" and prejudice "against persons in interstate commerce".

The Commission erred in failing to make the Specific Finding requested in Point VIII of North Carolina's brief, page 26.

The Coach Fare of 1.5 Cents Was Found Not Unreasonable, Augmented Rail Revenues, and Was Stoutly Championed By the Southern Railway; and the Burden of Proof to Justify Any Increase Rested Heavily Upon the Railroads

Exception is taken to the failure to find, in the treatment of the History of the coach fares on sheet 3 of the Federal Commission's Report, not only that the Federal Commission approved the 1.5 cent coach fare as being *not unreasonable or otherwise unlawful* in *Passenger Fares and Surcharges* 214 I. C. C. 174, but also that the Federal Commission, in that Report in 1936, itself advocated reduced fares as the principal source from which the railroads could expect to derive additional revenue to meet the loss [fol. 972] of traffic due to competition (214 I. C. C. at page 175, 176, 184). Exception is also taken to the failure to find that the Southern Railway,—the principal respondent in the North Carolina Case—"feels *strongly* that in the southern district any fare higher than 1.5 cents in coaches will not attract volume traffic to the rails, but that, at such a fare, passenger traffic in coaches can be made profitable". It asks that its present fare basis be not disturbed, and that no order be made against it in respect of passenger fares". (214 I. C. C. 192.).

Exception is taken to the failure to find that the 1.5-cent fare benefitted the S. A. L. Railway and the L. & N. (214 I. C. C. 194).

Exception is taken to the failure to find that the purpose of the 1.5 cent fare, when published in 1933, during the Depression, was to produce "the greatest passengers and greatest revenue" (tr. 59); and that its purpose was fulfilled. (tr. 5960).

Exception is taken to the failure to find that the burden

of proof, to justify any increase in the existing intrastate coach fare of 1.65 cents (the 1.5 cent fare plus the 10% general increase) rested heavily upon the railroads, and was not met.

The incorporation of these facts in the Federal Commission's Report are important in that they will warrant a reversal of the Federal Commission's Finding No. 6, which in effect would fix the maximum interstate coach fare of 2.2 cents as the *minimum reasonable fare* for intrastate coach travel.

Exception is taken to the failure to make these Specific Findings as requested in Point I of North Carolina's brief, pages 6 to 12 inclusive.

[fol. 973] The Rejection of Evidence As To the Reasonableness of the Interstate Fares Precludes the Finding That the Interstate Fares Are the Minimum Reasonable Fares For Intrastate Coach Travel

Exception is taken to the finding on sheet 4 of the Report that "we shall first consider the evidence bearing upon the reasonableness of the interstate fares", and to the treatment and consideration of that subject on sheets 4 to 10, inclusive.

The states of Alabama and North Carolina and the Price Administrator petitioned the Federal Commission to investigate the reasonableness of the interstate coach fares. (North Carolina Exhibit No. 14). These petitions were summarily denied, without any statement of grounds.

The Federal Commission erred in law in denying the Petitions of those States. (See Point III North Carolina Brief, pages 19-20.)

The Federal Commission erred in law in denying the petition of the Price Administrator. (Section 1 of the Stabilization Act of October 2, 1942, 50 U. S. C. A. App. 961 et seq. Executive Order 9328, F. R. 6481.) (See Point IV in North Carolina's brief pages 20, 21).

At the hearing in the North Carolina Case, when the Examiner was propounding the issues, the question was put to him whether, in view of the fact that the Federal Commission had denied North Carolina's Petition to investigate the reasonableness of the interstate coach fares on trains going through North Carolina, "the reasonable-

ness of the interstate coach fares is not in issue", (tr. 14). The Examiner thereupon ruled that:

> [fol. 974] "Well it (the reasonableness of the interstate coach fares) is before the Commission to the extent that it is a burden resting upon respondents (railroads) to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. *Otherwise, it is not in issue. It is not subject to attack,* and the parties are at liberty to show what facts they have and their position on that particular question".

Note his ruling that the burden of proof was upon the railroads; that otherwise the reasonableness of the interstate fares is *not in issue;* and is *not subject to attack.* In other words, North Carolina was limited to rebuttal of any facts which might be presented by the railroads in meeting the burden of proof to show that the present interstate fares are "not in excess of maximum reasonable fares."

In view of the fact that the railroads made no attempt to sustain the burden of proving the reasonableness per se of the interstate fares, other than to show what they are, and in view of the fact that the petitions of the States and the Price Administrator to investigate the interstate fares had been summarily denied, and in view of the Examiner's ruling that the reasonableness of the interstate fares "is not in issue" and "not subject to attack," the Federal Commission should be estopped from entering, in its Report, upon any determination of the reasonableness of the interstate fares.

The Commission erred in not making the Specific Findings, on these points, which were Requested in Point III, Point IV and Point V of the North Carolina Brief, pages 18-22.

The failure to make these requested findings is important in that they would warrant a reversal of the Federal Com- [fol. 975] mission's Finding No. 1—that the interstate coach fares are just and reasonable.

That Finding No. 1, according to the Report, is founded upon two major concepts: first, that "the record does not warrant any modification of our conclusion in the Report on further hearing in Ex Parte 148 with respect to the passenger fares of these respondents"; and second, that "it is a well settled rule that the most helpful evidence in deter-

mining the reasonableness of rates or fares is comparison with other rates or fares for like services". (Report, bottom paragraph, sheet 10).

Neither of those concepts has application here or warrants the Federal Commission's Finding No. 1.

In *Increased Railway Rates, Fares, and Charges,* 1942 248 I. C. C. 545, known as Ex Parte 148, the Commission had under consideration the railroads' application for a nationwide horizontal increase of 10% in all fares, except furlough-fares, (p. 550) and freight-rates, subject to certain modifications as to freight-rates, to meet impending wage increases when a nationwide strike threatened to tie-up the entire rail transportation system.

The Federal Commission therein treated the matter of fares *in the aggregate* for all carriers, and apparently no evidence was submitted and no findings were made as to the fares for any particular class of travel. The Commission merely stated what the basic fares, throughout the nation were, and mentioned the 1.5-cent fare in coaches in the South. The 10% increase was permitted in *all* passenger fares, including the 1-5-cent coach fare in the South; and that increase was permitted by the Four State Commissions. Therefore, it cannot be said that the Report in Ex Parte 148 dealt with any fares for any particular type of passenger service on any particular railroads. There was no evidence [fol. 976] and no finding in that case which was determinative or could have been determinative of the question at issue in the North Carolina or other State Intrastate Coach Fare Cases.

The evidence in that proceeding was adduced at hearings on January 5 and 9, 1942, just after our entry into the war; and the conclusions of the Federal Commission in that proceeding were not, and could not have been founded upon the conditions of the war-years of 1942 and 1943, which so vastly changed the entire picture of railroad transportation, as to volume of traffic, revenue, expenses, net revenues and rates of return on investment, and hence, unit operating costs (full costs including return).

The Commission erred in basing its Finding No. 1, as to the reasonableness of the interstate fares of the North Carolina lines in 1944 under changed conditions, upon its decision in Ex Parte 148 (248 I. C. C. 545).

Comparisons of Rates Based Upon Distance Alone Have Little Probative Value

The second concept upon which the finding of reasonableness of the interstate rates is founded is that, "It is a well-settled *rule* that the *most helpful* evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services". Report, sheet 10.)

The quoted statement is in error in several respects. In the first place there is no such "well settled *rule*". The general principle, to which the Federal Commission intended to refer is that stated in I. C. Act, Anno., Vol. I, page 460 as follows:

> "Comparison is a common and recognized *aid* to the formation of an opinion".

[fol. 977] (See long list of cases cited). But there are many ramifications and different applications of that general principle. Among them are the following:

> "A mere comparison of rates is not of itself sufficient to warrant the condemnation of the higher rates."

(I. C. Act Anno. p. 462 and list of cases cited.)

> "While comparisons with rates to other points are pertinent, it is necessary to take into consideration other factors than rates and distances."

(I. C. Act, Anno. p. 462, and list of cases cited.)

> "Comparisons based upon distance alone have but little probative value".

(I. C. Act Anno. p. 478 and list of cases cited.)

> "Comparisons based upon distance alone are insufficient to establish the unreasonableness of rates".

(I. C. Act Anno. and list of cases cited.)

> "Comparisons based on distance alone have but little probative value in measuring the reasonableness of rates."

(I. C. Act Anno. 478 and list of cases cited.)

> "As a matter of law rates need not be the same for the same distance over two different roads."

(I. C. Act Anno. p. 478, citing *Interstate Commerce Commission v. Union Pac. R. Co.* 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. Rep. 108.)

Attention is directed to the fact that the only comparisons of fares which are made in the North Carolina Case are comparisons for certain distances of the intrastate coach fares with the interstate coach fares.

The Commission erred in finding that "It is a well-settled *rule* that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services".

[fol. 978] There are other reasons why the so-called "well-settled rule" has no fair application to the facts presented in the North Carolina Case. The 2-cent coach fare was found to be not unreasonable in the 1936 Passenger Fare Case, based upon statistics of the railroads during the depths of the economic depression of the early and middle 1930's.

The fact that the Federal Commission prescribed or approved both of these fares under conditions of low passenger traffic density, small number of coach-passengers per mile, and deficits in net railway operating income from passenger operations, raises a presumption that both fares were reasonable under *those* conditions. But the showing in the North Carolina record of the vast changes in conditions, the vastly increased density of passenger traffic, the vastly increased number of coach passengers per mile, the excessively high rates of return on investment during the war-years of 1942 and 1943, and the handsomely low passenger operating ratios of the Strong Lines in North Carolina raise a very strong presumption that what may have been reasonable fares—1.5 cents and 2 cents per coach passenger mile in 1934 and 1935, could in no sense be accepted as measuring reasonable fares during the existing war-years under vastly changed conditions.

The logical deduction from these facts and circumstances is that the majority report of the Federal Commission had to lean heavily upon the simple comparisons of intrastate with interstate coach passenger fares, and had to overstate the principle as to the ordinary use of "comparisons" to bolster up and overcome the inherent lack of evidence to support the finding of reasonableness upon which to fix that rate as a minimum fare for intrastate coach travel.

[fol. 979] The Federal Commission erred in failing to make the Specific Finding Requested in Point XI of North Carolina's brief, pages 28-30, that the railroads' mere comparison of "interstate with intrastate fares proves nothing which would warrant the exercise of federal power over intrastate rates".

The Federal Commission erred in failing to follow the finding of the Supreme Court in *Florida v. United States* 282 U. S. 194, 212, that mere difference between particular rates on interstate and intrastate traffic is not sufficient. (See North Carolina's Brief, p. 30).

The 1.5 Cent Fare Was Not "Subnormal"

Exception is taken to the statement in the next to the bottom paragraph on sheet 4, that the 1.5 cent fare "was a subnormal fare."

The Federal Commission, during the depression, found that it was not unreasonable. It gained traffic and revenues, which the prescribed maximum fare failed to do. It benefitted the carriers who published it. Under the changed war-year conditions the presumption is that the fare of 1.5 cents, then not unreasonable, must be too high under existing conditions. There is no evidence to support the assumption that it was subnormal then, or is subnormal now.

The Federal Commission erred in failing to make the Specific finding requested in Point IX of the North Carolina Brief, at page 26, that there is no allegation or proof that the North Carolina intrastate coach fares are non-compensatory or unreasonably low.

The evidence raises strong presumptions to the contrary.

[fol. 980] There Is No Evidence and No Issue Here as to the Rationing of Passenger Travel

The Federal Commission erred in discussing, on sheet 5 of the Report the question of avoidance of rationing of passenger travel. That subject is wholly extraneous, insofar as the North Carolina Case is concerned. The Commission's quotation of its own statement that "any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel", has no place in this proceeding. The railroads have offered no evidence that they desire to increase the intrastate coach fares to dis-

courage passenger travel—as indicated by the Federal Commission. The evidence is to the contrary.

The chief witness for the North Carolina railroads, an experienced passenger traffic official, when questioned as to the effect on the traveling public of a change from 1.65 to 2.2 cents in civilian coach fares in North Carolina, testified: "I do not think that it would have any effect whatsoever". (tr. 46). He repeated that three times; and he must have meant just what he said. He gave as his reason the fact that "the amount involved would be so small that I don't think it would have any influence on him (the traveler). (tr. 47).

Another railroad passenger official testified that such a change in the North Carolina intrastate coach fare would not "keep anybody off the train". (tr. 159).

The implication from the discussion of rationing of passenger travel in the Federal Commission's Report that travel may be averted by increasing the intrastate coach fares is unfair, without evidence to support it and contrary to uncontradicted evidence. That portion of the Report should be deleted.

[fol. 981] The Commission May Not Lawfully Require Increases in Fares under Existing Changed Conditions of Excessively High Earnings, as a Means of Off-setting Deficits from Passenger Operations in Past Years under Different Conditions

Exception is taken to the treatment accorded to deficits from passenger operations of the several groups of carriers in the Four States on sheets 5, 6 and 7 of the Report.

The plain import of the Commission's showing of deficits in net railway operating income from passenger operations during the years 1936, 37, 38, 39, 40 and 41, prior to the War-years and the so-called "average deficits for a seven year period, including the profits of 1942, is that the Commission intended that the Roads should maintain excessively high passenger fares now, so as — recoup their losses in past years.

While there may be no specific finding that the Commission's Report is intended to allow the railroads, by increases in intrastate fares in the Four States, to recoup a portion of their deficits from passenger operations in the

pre-war years, the method of treatment of this subject in the Commission's Report clearly points to the fact that that is just what the Commission had in mind. If not, then there is no other explanation for the Commission's failure to take into consideration the evidence of present-day conditions, of the excessive earnings and inordinately low passenger operating ratios of the Strong Lines. (See Points XV to XXI in the North Carolina Brief, page- 36-44).

The Commission's Report is silent upon this point, which was especially presented in the Briefs of the Price Administrator in the Four State Cases. His point was that "regulation does not insure that the business shall produce [fol. 982] net revenues", citing *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U. S. 575, 62 S. Ct. 736. At page 590 (747) the Supreme Court said:

> "But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." *Galveston Electric Co. v. City of Galveston*, 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446, 447, 23 S. Ct. 571, 573, 574, 47 L. Ed. 892. The deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."

This principle of constitutional law cannot be side-stepped by allowing carriers, in high-profit years, to increase their fares as a means of offsetting the passenger losses incurred in lean years, or as a means of recouping those losses.

The Federal Commission erred in law in taking into consideration deficits of respondents from net railway passenger operations in past lean years, in arriving at the minimum rates which it proposes to fix for intrastate coach fares in North Carolina, during the surplus-fat war-years.

The Arrangement of the Deficit Figures in the Report Unduly Magnifies the Picture

Exception is taken to the arrangement employed by the Commission in setting forth the deficits from passenger operations in the prewar years.

[fol. 983] On sheet 5 the table of deficits from passenger operations shows the results of 5 principal respondents in No. 29036, two of which were the Weak Lines, hereinbefore mentioned. The table on sheet 6 shows the deficits of 12 respondents in Alabama. The tables on sheet 7 show the deficits for the 7 principal lines in Kentucky and 8 principal lines in Tennessee. It is more than likely that some line's deficits are included in each, or more than one of the four tables. It is quite likely that lines of the Southern Railway system and the Louisville & Nashville, for example, may be included in the aggregates shown in two, three or four of the tables. It is likely that the use of the four tables unduly magnifies the actual picture. But due to the omission of the names of each carrier in each Group the amount of duplication in the figures does not appear upon the face of the Report.

North Carolina asks that the deficits recast by individual lines, and not in four intertwined and intermingled groups, so that a fair and unmagnified picture of the aggregate deficits will appear in the Commission's Report.

The Failure to Set Out the Rates of Return on Investigation During the Two War-Years Unduly and Unfairly Minimizes the Effect of the Existing Conditions

Exception is taken to the failure, on sheet 6, to set forth the passenger operating ratios of the North Carolina Lines for the year 1943, and their rates of return on investment before federal income taxes for the war-years 1942 and 1943.

The Report mentions the evidence of the Price Administrator, which shows the passenger ratios and the rates of return on various investment bases. Those figures are im-[fol. 984] portant in that they show that the war-time ratios of the Strong Lines are more profitable for passengers than for freight operations; that both freight and passenger operating ratios are unduly and unreasonably low (which means that the passenger fares and freight rates are unduly and unreasonably high) and that their rates of return on

investment before federal income taxes are extravagantly and excessively high.

North Carolina asks that, in order to present a clear and adequate picture, the passenger and freight operating ratios and the rates of return before federal income taxes be incorporated in the Commission's Report. They are set forth in detail in Exhibit No. 20, and in Points XVI, page 37-39, and Point XX, page 42 of the North Carolina brief.

For example, the Southern Railway's passenger operating ratio was 47.1% for the nine months of 1943 (Exhibit 20); and its rate of return using book investment plus cash and materials and supplies after depreciation and net railway operating income before federal income taxes, was 17.7%. (Exhibit 20, p. 6, Column 11.)

If the figures and the methods in the O.P.A. Exhibit No. 20 are right, the Commission should have set them forth in its Report so as to present the true picture. If the figures are wrong or if the methods are wrong, the Commission was obligated to the Price Administrator to say wherein they were wrong, so that the Commission's views as to proper accounting methods could be examined, rebutted, and, if necessary, tested in the Courts.

The presentation of the true figures, based upon sound accounting methods, is very important in these proceedings. If the O.P.A.'s figures and methods are right, then there is no warrant in fact or in law for the Commission's finding that the alleged preference of intrastate persons [fol. 985] should be removed by increasing the intrastate coach fares.

The Commission's failure to present the O.P.A.'s figures in its Report or to state its reasons for rejecting them, is arbitrary.

North Carolina asks that opportunity be given, at a further hearing, to present similar figures for the complete year 1943, in lieu of the periods used in the O.P.A.'s Exhibit No. 20, in order that true comparisons can be made as between the years 1941, a pre-war year, and the two complete war-years, 1942 and 1943.

North Carolina asks that the Federal Commission itself have prepared by its staff and to present at a further hearing, its own computations as to passenger ratios and rates of return on investment before federal income taxes of the respective respondents in the Four State Cases, for the years 1942 and 1943.

Consideration of Rates of Return After Federal Income Taxes Is Improper

On sheet 16, fourth paragraph, in discussing the evidence in the Kentucky Case the Federal Commission sets forth rates of return on investment of 7 respondents "*after* Federal income taxes."

And, the Commission finds, at the bottom of sheet 16, that "The evidence here before us (meaning rates of return after federal income taxes) does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return".

Exception is taken to the consideration of rate of return *after* federal income taxes, and to the quoted finding which is based thereon.

If the Commission had set forth the rates of return of the principal respondents before federal income taxes and [fol. 986] had related the excessive returns to the passenger traffic, in the relation of their respective passenger operating ratios, the finding, above quoted, could not stand the test of arithmetic or logic. Since the passenger ratios, of the principal lines at least, were in 1943 equal or lower than their freight ratios, and since they were earning excessive rates of return before federal income taxes, the logical conclusion is that both passenger and freight traffic *are* producing far more than a fair return and the existing fares are unreasonably high.

Thus the question, whether rates of return should be computed *before* or *after* federal income taxes becomes of primary importance in testing the Commission's finding that respondents' passenger traffic is not producing "more than a fair return".

The point was raised in the North Carolina Brief, page 42 and by the Price Administrator. The point was raised again at the oral argument. If the Federal Commission has overlooked what was urged and if the Commission has overlooked its own former pronouncements upon that point, it is the duty of the Federal Commission to retract the above quoted finding, or to explain why the Commission has changed its views, and what are the reasons which prompted it to switch, in these Four Cases, from the "*before*-federal-income-taxes" theory to the "*after*-federal-income-taxes" hypothesis.

In *Reduced Rates, 1922,* 68 I. C. C. 676, 683, and *Increased Rates, 1942,* 248 I. C. C. 545, 556 the Commission employed the "Before" theory. The Commission said in the 1942 Case at page 556:

> "We may obscure that, while taxes have been deducted in stating net railway operating income in the foregoing table, we have held in *Reduced Rates 1922,* [fol. 987] 68 I. C. C. 676, 683 that railway corporations should, like other corporations, pay their Federal income taxes out of the income rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it (them) to retain the designated fair return over and above the tax."

There is no intimation in the Federal Commission's Report in the Four State Passenger Fare Cases why the "*before*" theory is not sound, why it was not employed, or why the Commission departed from the theory which it employed in the *Reduced Rate Case, 1922,* and the *Increased Rate Case, 1942.*

North Carolina contends that the Commission erred as a matter of law in employing the "after" and not employing the "before-federal-income-taxes" theory to obtain net railway operating income in computing rates of return.

The Values and Methods Employed in Computing Rates of Return Thereon Should Have Been Explained in the Federal Commission's Report

Exception is taken to the failure of the Federal Commission to show in its Report the basis for values of carrier property and the methods employed in arriving at the rates of return on value which form the basis of the Commission's finding at the bottom of sheet 16 that the passenger traffic of respondents as a group is not producing more than a fair return.

Did the Commission merely employ the railroads figures?

Did the Commission tacitly sanction the carriers' methods of arriving at their rates of return?

[fol. 988] Did not the railroads' base for value take no depreciation into account?

Did not the base for value include the cost or value of rented equipment and joint facilities?

Were operating rents deducted from net railway operating income?

These questions were raised in the evidence and in the Briefs. The parties are entitled to an answer to these questions, so that they may rebut the values and methods employed in computing the rates of return upon which the finding at the bottom of sheet 16 was based, and so that they may have opportunity to test the Commission's method in the courts.

The Average Rate of Return Was Excessive Even "After" Federal Income Taxes

Recent statistics prove that the Commission was wrong in finding that "the evidence here before us (meaning rates of return after Federal income taxes) "does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return". (Sheet 16, 6th paragraph).

The monthly comment on transportation statistics issued by the I. C. C. Bureau of Transport Economics and Statistics dated April 6, 1944 shows that the class I carriers in the Southern region earned 15.47% on capital stock; 7.11% on net book property investment less accrued depreciation; and 8.06% on the value of the property "after" deduction of all taxes, including Federal income and excess profits taxes.

This rate of return on I. C. C. Value (229 I. C. C. 451) of 8.06% is 40% higher than the standard fair return of 5.75% after taxes.

[fol. 989] The record shows that some of the principal North Carolina lines' operating ratios were equal or lower for passengers than for freight. Therefore it is obvious that the passenger traffic of the principal respondents in North Carolina at least is producing far more than a fair return.

Deluxe Streamlined Reserved-seat Coaches Are Not Available for Intrastate Travel

On sheet 8 the Federal Commission finds that the respondents have expended large sums of money in providing air-conditioned and de luxe coaches and diesel-powered locomotives.

This new and expensive equipment is used in streamlined fast-scheduled trains, as between New York and

Miami and New York and New Orleans. North Carolina travelers are almost wholly excluded, or practically excluded from making any use of this type of service.

The evidence in proof of that statement is convincing and practically unchallenged. Local tickets are not sold to North Carolina intrastate travelers on Seaboard Air Line streamlined trains. Travel on the A.C.L.'s streamliners in North Carolina is restricted to about two or three stations. Travel on the Southern Railway's streamliners is restricted to not more than six stations. (See North Carolina's Brief, pages 54-60).

Exception is taken to the failure of the Federal Commission to find that: *North Carolina intrastate coach travelers are practically excluded from the use of the expensive de luxe reserved-seat coaches on fast streamlined trains; and no part of the added expense of or the investment in the de luxe streamlined trains is chargeable to North Carolina intrastate travelers who must use antiquated non-reserved-seat coaches.*

[fol. 990] The Unusual Expenses of Troop Movements Are Not Chargeable to Civilian Travel in Non-reserved Seat Coaches.

On sheet 8 the Federal Commission stresses the fact that the expedited movement of troop trains has resulted in unusual expenses.

What the government pays to the railroads for troop movements is of no concern to the North Carolina Commission or the North Carolina travelers. The compensation for such movements is a matter of contract between the government and the carriers. Exception is taken to the plain import of the Commission's findings that intrastate coach fares for travel in non-reserved seat coaches and antiquated coaches in North Carolina should be charged with the unusual expenses which are directly attributable to the movement of troop trains.

Exception is taken to the failure of the Federal Commission to find that the unusual expenses for movement of troop trains affords no justification for an increase in fares for travel in non-reserved seat coaches. (See Point XIV at pages 35-36 of North Carolina's Brief).

The Federal Commission Places an Extreme Interpretation Upon Section 15a Which Would Shock the Congress Which Enacted It.

The Federal Commission, on sheet 15 of its report, overrules the point—that civilian coach fares should not be increased to assist in bearing the special expenses of troop-train movements, and the Commission says that:

> "To concede the correctness of this contention might be to impair the effectiveness of the provisions of Section 15a relative to the adequate and efficient railway [fol. 991] service and to defeat the national transportation policy as declared in 54 Stat. L. 899, relative to developing coordinating and preserving a national transportation system adequate to meet the needs of commerce of the United States, of the postal service, and the national defense, * * *"

The Commission's argument is plain fallacy. Let us review a few outstanding facts of record:

Troop train movements are especially expensive. Civilians do not ride in troop trains. Compensation for troop train movements is a matter of contract and not a matter of rate-regulation. The passenger operating ratios for January-September, 1943 (Exhibit No. 20, p. 4 were as follows:

Average of North Carolina respondents	52.3%
Atlantic Coast Line	51.2
Clinchfield	109.4
Louisville & Nashville	20%
Norfolk Southern	132.6
Seaboard Air Line	51.5
Southern Railway	47.1

(North Carolina's brief, p. 39).

The same exhibit, for the same period shows their rates of return as follows:

Rates of return of seven respondents	18%
Atlantic Coast Line	22.1%
Clinchfield	45.5%
Louisville & Nashville	20.%
Seaboard Air Line	17.6%
Southern Railway	17.7%
Norfolk Southern	7.9%

(North Carolina's Brief, p. 42-43).

In view of the long-time acceptance generally by the Federal Commission of 5.75% as a fair return on invest-
[fol. 992] ment of carrier property for rate-making purposes, in order to carry out the provisions of Section 15a and the national transportation policy in 54 Stat. L. 899, who would seriously contend or believe that the Congress intended that the Commission should increase any rates or charges for the purpose of providing additional revenue of the carriers when the North Carolina lines' passenger ratios average 52.3% and the rates of return average 18%, or more than three times the usual and accepted rate of fair return for railroads?

More specifically, who would in seriousness contend that Congress meant, by Section 15a or 54 Stat. L. 899 that the Commission should increase civilian coach fares for the purpose of defraying a portion of the cost of the war, incident to the special expenses incurred in the movement of troop trains?

Need any more be said to demonstrate that civilians should not pay higher than reasonable fares to pay the added costs of troop train movements? Need any more be said to demonstrate that the Commission's statement of the opposing view is fallacious?

The Commission erred in failing to make the Specific Finding requested under Point XIV at page 35-36 in North Carolina's Brief.

This is Not a Revenue-Need Case

The railroads did not allege that they "need" additional revenue. They disclaimed that this was a "revenue-need" case. How could they allege need of revenue in view of their excessive earnings and excessively high rates of return?

The Commission erred in failing to make the Specific
[fol. 993] Finding under Point XV at pages 36, 37 of the North Caro-lina Brief that this is not a revenue case, and hence there is no basis for a finding of "discrimination against interstate commerce" under section 15a.

Respondents are Earning Excessively High Rates of Return on Investment

The Commission erred in failing to make the Specific Finding Requested in Point XX, at pages 42 and 43 of the

North Carolina Brief that respondents, even the two weak lines, are earning excessively high rates of return on investment.

Increased Expenses of Passenger Operations Generally During War-Years Have Been Far More Than Off-Set By Increases in Passenger Revenue

On sheets 8 and 9 the Federal Commission stresses at length the fact that the expense of passenger operations has been increased during the war by the expansion of ticket selling forces, use of additional trains, increases in wages and increases in prices of materials and supplies, etc.

The plain import of these detailed findings is that the increased expenses of passenger operations as a whole warrant increases in intrastate coach fares to the interstate level.

Exception is taken to the failure of the Federal Commission to find in its Report, directly, that the vast increase in passenger travel, particularly in coaches, has increased the passenger operating revenues so greatly that under war conditions the passenger operating revenues far more than off-set the increased costs of passenger operations under war conditions; that the increase in passenger revenues has been so great that the unit cost of hauling coach [fol. 994] passengers per mile has been greatly reduced; and that reductions, rather than increases, should be made in the coach fares. (See North Carolina's brief, Points XVII, XVIII, pages 38-41).

All Trains Are Not Available to Intrastate Passengers

Exception is taken to the finding on sheet 13, next to last paragraph that "*all trains* . . . in each of the states are available to and are used by both interstate and intrastate passengers" . . .

The evidence shows, clearly, that the modern expensive de luxe streamlined trains and coaches are used in long-haul through service; and that there are restrictions against the use of such trains by North Carolina intrastate travelers so that almost no intrastate traveler in North Carolina can use such trains. (See Point XXVII in North Carolina's Brief, pages 54 to 60).

There Are Two Distinctive Types of Dissimilar Service—One in Reserved Seat Coaches in De Luxe Trains, and the Other in Antiquated Non-Reserved Seat Coaches

Exception is taken also to what the Federal Commission describes on sheet 13 as "typical" of conditions which exists "between interstate and intrastate passengers on every mile of track operated in passenger service" . . .

The evidence shows that there are two distinctive types of coach service. One is the use of a reserved, soft-cushioned seat, in a fast, ultra-modern streamlined train which cannot be availed of by the local intrastate traveler in North Carolina. The other is the use (if he can get on the train) of a non-reserved seat (if he can get a seat at [fol. 995] all) in dirty, antiquated coaches in slow local trains under most disagreeable conditions. The latter is the typical and distinctive type of service for which the North Carolina traveler objects to paying any more than the existing non-reserved seat local fare of 1.65 cents.

The Federal Commission Has Misstated the Position of the North Carolina Traveler In Its Report

The North Carolina traveler is not objecting to paying a higher fare for a comfortable reserved-seat in a fast de luxe train. What he is objecting to is an increase in fare for uncomfortable and disagreeable travel in dirty and overcrowded non-reserved seat coaches on slow trains.

North Carolina is not claiming that the uncomfortable and disagreeable travel in over-crowded non-reserved seat coaches is peculiar to North Carolina or confined to North Carolina. What North Carolina is contending is that no passenger who has to ride in a non-reserved seat coach under disagreeable conditions should be required to pay an increased fare, whether he be traveling intrastate in North Carolina, or interstate to or from North Carolina, or intrastate or interstate elsewhere. North Carolina's position is that wherever these two distinctive types of service exist, the traveler should pay less for non-reserved seat travel than for reserved-seat travel, and that he should not pay more for non-reserved seat travel than the existing fare of 1.65 cents; and that even that fare is more than the service is worth. (See Point XXVII in North Carolina's Brief, pages 52-60.)

Exception is taken to the Federal Commission's statement on sheet 17 that North Carolina contends that "the intrastate coach fares in that state properly should be on a [fol. 996] lower level than the interstate fares." North Carolina's position is that the intrastate coach fares for travel in non-reserved seat coaches should be lower than the fares for travel in reserved-seat coaches whether the travel be intrastate or interstate.

There is No Actual Proof that Interstate Travelers Defeat the Interstate Fares

The Commission erred in attaching importance to the lengthy findings on sheet 14 to the effect that intrastate fares "*may*" be used to defeat interstate fares.

The Federal Commission states that specific evidence and proof thereof "was not submitted." The Commission's finding should have stopped there but the Commission went on to say that such proof "admittedly is difficult to obtain." Then the Commission goes on and gives credence to speculative testimony as to the effect of such unproven practices upon the carriers' revenue.

Having found that there was no specific evidence to prove this point the Commission erred in accepting hearsay and unsupported statements of railroad witnesses on the ground that the required proof "is difficult to obtain." There is no rule of law by which the Commission could excuse the carriers' lack of proof on the ground that such proof is "difficult to obtain."

The reason such evidence was difficult to obtain and was not obtained is that the differences between interstate and intrastate fares were of *no concern* to interstate travelers and caused them no damage or injury.

The Federal Commission Erred in Ignoring the Position of the Price Administrator

Exception is taken to the Federal Commission's treatment of the position and briefs presented on behalf of the [fol. 997] Price Administrator in the Four State Cases. (See Sheet 18 of the Report.)

The upshot of the Commission's discussion of the Price Administrator's evidence and position is that notice of the proceedings was given to the Price Administrator and that the duty of the Interstate Commerce Commission ended there.

In *City of New Jersey v. United States*, Civil Action 3073, for the District of New Jersey, a 3-Judge Court perpetually enjoined an order of the Interstate Commerce Commission insofar as it permitted the establishment of any local interstate fare in excess of 8 cents for transportation on the down-town line of the Hudson and Manhattan Railroad Company. (See *Passenger Fares of Hudson & Manhattan R. Co.* 227 I.C.C. 741 and 256 I.C.C. 507. *Hudson & M. R. Co. v. United States* 33 Fed. Supp. 495, affirmed 313 U. S. 98.

The Supreme Court has noted probable jurisdiction on the appeal to set aside the permanent injunction.

In its findings of fact and conclusion of law the 3-Judge Court referred to the position of the Price Administrator that:

> "In view of petitioner's tremendously improved current earnings it is requested that this Commission reconsider its previous modification and its original order and return petitioner's down-town fares to the original level of 8 cents. This will serve the National program to keep down the cost of living."

The 3-Judge Court also referred to the attempt to introduce a condensed income statement of the defendant railroad covering the months of July 1942 and July 1943 and the first seven months of 1942 and 1943 respectively. The exhibit which showed a repeatedly improving financial [fol. 998] position of the railroad was excluded. Tender was made of evidence as to the 1943 earnings. The Federal Commission said that such evidence would not warrant any modification in its findings and the motion to submit the evidence was over-ruled.

The Court referred to the Commission's finding as to the effect of the increase that "'an increase of 1 cent in respondent's down-town fare is unlikely to have any inflationary effect.'" The Court held that the Commission "erroneously assumed that said increase would not have any effect on the program to keep down the cost of living," and that the Price Administrator was entitled to the perpetual injunction of the I. C. C. order insofar as it permitted the establishment of any local interstate fare in excess of 8 cents for transportation on the down-town line of said defendant Hudson & Manhattan Railroad.

The Federal Commission erred as a matter of law in ignoring and failing to take into consideration the evidence and contentions of the Price Administrator in opposing any increase in the intrastate coach fares in North Carolina, Kentucky, Tennessee and Alabama.

The Federal Commission Must Consider Existing Conditions

Attention is directed to the holding in the *Jersey City Case* that the Federal Commission must take into consideration the *existing conditions*, in fixing rates. That is a point which North Carolina stressed in its Brief and Argument—that the Commission should base any findings as to rates for the future upon *existing conditions*—not upon statistical averages of years prior to the war under conditions which are non-existant today, and which have been non-existant since our entry into the War in December [fol. 999] 1941; and that the Federal Commission erred as a matter of law in basing its findings upon pre-war statistics in order that the carriers might recoup their losses in past years. The subject of recoupment of deficits in former pre-war years was dealt with earlier in this Petition. (See Point XIX in North Carolina's Brief, page 41.)

The Commission Should Base Its Findings Upon Reasonable Expectancy that Existing Conditions Will Continue

North Carolina, in its Brief and at oral argument, showed that there was no immediate expectancy of a sudden termination of the war with Germany and Japan; and that the reasonable expectancy is that existing war-conditions of travel by rail will continue, even for some years after the War. The Commission did not even mention this point in its report, although North Carolina prayed that a specific finding, to this effect, be made.

The Commission erred in failing to find that there is reasonable expectancy that existing war-conditions of travel and excessively high railroad earnings will continue for some years; and erred in basing its findings upon statistics of pre-war years, to the exclusion of existing war-years of 1942, 1943, and early 1944. (See Point XIX in North Carolina's Brief at page 41.)

The Railroads Failed to Prove the Relation of Their Expenses Per Passenger Mile to Their Revenues Per Passenger Mile in Coaches

The Commission erred in failing to find, as requested by North Carolina, that the burden of proof was upon the railroads to show what are their expenses per passenger [fol. 1000] mile in coaches under existing war-conditions of 1942 and 1943.

The fare at issue in the North Carolina Case is the coach fare. The railroads are asking that the federal power be exerted to permit them to increase that fare from 1.65 cents per passenger mile in coaches to 2.2 cents. The railroads had in their possession the facts and statistics by which they alone could have shown what are their expenses per passenger mile in coaches under existing conditions, and they failed to produce such evidence.

In *Passenger Fares and Surcharges,* 214 I. C. C. 174, the railroads showed the relation of their revenues per passenger mile and per passenger car-mile to the passenger expenses per mile and car-mile for all types and separately for coaches and for Pullman or parlor cars. (214 I. C. C. 179 at page 180.)

The Federal Commission, in its Report, set forth such expenses elaborately and undoubtedly leaned heavily upon such comparisons in reaching its conclusions.

Why, then, did the Federal Commission not require of the railroads that they present such proof in these Four Intrastate Fares Cases? or Why did not the Federal Commission hold the railroads to their burden of proof that the present intrastate fares per passenger mile in coaches are not commensurate with the expenses per passenger-mile in coaches under existing conditions? The Federal Commission erred in law in not doing one thing or the other in view of the Specific Point XXII and Requested Finding which was made at page 44 in North Carolina's Brief.

[fol. 1001] The Failure of the Railroads to Show the Relation of their Proposed Fares Per Passenger-Mile in Coaches to Their Expenses Per Passenger Mile in Coaches Is "Evidence of the Strongest Character" Against Them

The railroads failed, in any of the Four State Fares Cases to present any proof that the existing intrastate

coach fares are unduly low in relation to their expenses per passenger mile. The absence of such proof raises a very strong presumption of law against them. The logical and legal presumption is that if they could have proven that their fares are low in relation to their expenses under existing conditions, they would have produced the evidence which is in their possession and peculiarly within their knowledge.

North Carolina, in its Brief, invoked the doctrine of law that the failure of proof and their silence upon this point under such circumstances is "*evidence of the strongest character*" *against them.* See *Interstate Circuit v. United States,* 306 U. S. 208 (at page 225) 59 S. Ct. 467, and the long list of cases therein cited, and referred to in North Carolina's Brief, pages 45, 46.

The Federal Commission erred in ignoring entirely the Specific Finding Requested on this Point XXIII in North Carolina's Brief at page 45.

[fol. 1002] Computations from Statistics of Record Raise a Strong Presumption of Fact that the Intrastate Coach Fare of 1.65 Cents per Mile Greatly Exceeds the Expense per Passenger Mile in Coaches

North Carolina's brief, pages 50-53, makes use of certain statistics of record which show that in the year 1942 the average expenses per coach-mile of the six North Carolina respondents was about 33.03 cents; the number of passengers per coach was 33.62; and dividing the number of passengers per coach into the expenses per coach-mile produces an expense per passenger mile in coaches of 98 hundredths of one cent.

Based upon the incomplete statistics of 1943 the evidence indicated that the expense per passenger mile in coaches in 1943 would be about 81 hundredths of one cent.

North Carolina asked that the Federal Commission find that from the best available statistics of record, and in the absence of exact proof by the railroads, the existing intrastate coach fare of 1.65 cents is substantially in excess of the average expenses per passenger mile in coaches of the six North Carolina respondents, including the Weak Lines—the Clinchfield and the Norfolk Southern.

The Federal Commission erred in ignoring Points XIV, XV and XVI in North Carolina's brief, pages 46 to 53, and

erred in failing to make the Specific Finding therein Requested.

The Failure of the Federal Commission to Give Any Consideration to the Relation of Revenue to Expenses per Passenger-Mile in Coaches Was Arbitrary

In previous passenger fare cases the Federal Commission has given due consideration to the relation of passenger [fol. 1003] expenses for different types of service to the respective fares. Its failure to do so in these Four State Fares Cases, where the point was specifically raised and argued, was arbitrary. Such evidence is so important that, if it had been adduced, it would have warranted a complete reversal of the Commission's findings as to the measure of the intrastate coach fares.

North Carolina showed in Brief and at Oral Argument how sharply an increase in number of passengers per coach will reduce the unit expense per passenger; and North Carolina cited as its authority the Federal Commission's own expressions in *Passenger Fares and Surcharges*, 214 I. C. C. 174 at page 182.

Reduced to simple form: If the expense per coach mile is 20 cents and 10 people ride, the expense per passenger-mile is 2 cents. If the number of passengers per coach is increased to 40, the expense per passenger-mile would be only one-half cent per mile. Quadrupling the number of passengers per coach cuts the expense per passenger mile to one-fourth.

In 1933 the Seaboard's average number of passengers per car-mile was 7.16, and in January-July 1943, 30.84 passengers. The number of passengers was *more than quadrupled*. The use of quadrupling the passengers in the simple illustration is justified by actual experience.

The failure of the Federal Commission, either to reject the carriers' plea, for lack of proof on this point, or to see to it that such evidence was adduced before condemning the intrastate fares as being too low, was arbitrary.

The Federal Commission by this time has before it the Annual Reports of Carriers for the year 1943 as well as 1942.

North Carolina contends that the Federal Commission [fol. 1004] should reverse its conclusions as to the reasonableness of the intrastate fares, or should reopen the cases

for further hearing to receive evidence, and to produce evidence by its own Cost Section, if no such evidence is offered by the railroads, to show what has been the relation of revenue and fares in coaches per passenger mile to expenses and full-distributed costs per passenger mile in coaches for the war-years, 1942 and 1943.

The staff of the North Carolina Commission will assist in preparing and presenting the necessary evidence to show the true relation of such fares per passenger mile to expenses per passenger mile.

In view of the enormous increase in passengers per coach, and in view of the unreasonably low passenger operating ratios in the war years of 1942 and 1943, and the strong presumption that the great increases in passengers per coach has reduced the expense and full distributed cost (including fair return) below the existing intrastate fare of 1.65 cents, the denial of the Specific requests of North Carolina in this respect will be arbitrary.

Current Statistics Strongly Support the Presumption that the Existing Intrastate Coach Fares Yield All or More than the Expenses and Full Distributed Costs (Including Fair Return)

The strong presumption, that the greatly increased number of passengers in coaches has greatly reduced the expenses and full distributed costs per passenger mile in coaches, and that the unit costs per passenger-mile in coaches in 1943 were even lower than in 1942, is supported by the report in the I. C. C.'s Bureau of Transport Economics and Statistics' "Passenger Traffic Statistics (other than Commutation) of Class I Steam Railways in the United [fol. 1005] States," Statement No. M-250, page 2, twelve months ended with December 1942 and 1943.

That report shows that: Passenger revenues in *coaches* in the Southern Region, in which are the Four States, increased in 1943, over 1942, by 103.6%. That is, the passenger revenues of $181 Million in 1943 were more than double the passenger revenues of $89 Million in 1942. The increase in parlor and sleeping car revenue was 28.1%.

The number of revenue passengers carried in coaches in 1943 exceeded 1942 by 66.2%, and in parlor and sleeping cars 27.3%.

The number of revenue passengers carried one mile in coaches in 1943 increased 83% over 1942, and in parlor and sleeping cars 27.3%.

The revenue per passenger per road in coaches in 1943 increased 22.6% over 1942. The miles per passenger per road in coaches increased in 1943 10.1% over 1942.

Statement M-100 for December 1943 shows that the passenger revenues, in the Southern region increased from $20,148,508 in December 1942 to $26,750,059 in December 1943; and from $168,571,923 for the year 1942 to $282,997,160 for 1943, an increase of 67.9%.

Statement M-100 for January 1944 shows that the passenger revenues of the carriers in the Southern Region increased from $19,261,368 to $24,242,910, an increase for that month of 25.9% over the corresponding month of 1943.

Viewed in the light of any of the pre-war years, these statistics plainly point to the fact that the existing fares in the aggregate are unreasonably high; that the unreasonableness can be attributed primarily to the increase in the number of passengers in coaches, and not in parlor and sleeping cars; and that the crowded non-reserved seat coach travelers have provided the tremendous increases in reve- [fol. 1006] nues from passenger fares which have resulted in reducing sharply the unit expense per passenger mile in non-reserved seat coaches.

The fact that the number of passengers has increased so much more greatly in non-reserved seat coaches than in de luxe reserved seat coaches and parlor and sleeping cars during the war-years is due to the fact that the number of passengers carried in reserved seat coaches and parlor and Pullman cars has been limited by the seating capacity of the cars, which has not changed; and to the overcrowding of the non-reserved seat coaches far beyond their seating capacity. All of these things are matters of common knowledge and must be known to the Federal Commission as they are to the North Carolina Commission. And, if any proof thereof is needed North Carolina seeks an opportunity to prove them.

Reargument and Reconsideration

North Carolina asks, in view of the errors of law and facts, hereinbefore set forth, that a Proposed Report containing modified findings be issued, after the receipt of

additional evidence to be adduced at further hearing; and that these Four State Cases be assigned for reargument before the Federal Commission.

North Carolina will show that;

The decision of the Majority goes beyond the lawful power of the Federal Commission over state rates.

The exclusive original jurisdiction of the State over the intrastate rates does not shift to the federal authority upon the mere filing of a Section-13 complaint by carriers. The Federal Commission has no general authority to regulate intrastate rates. *State of Florida v. United States,* 282 U. S. 194.

[fol. 1007] Justification for the exercise of the Federal power *must clearly appear. Illinois Central Railroad Co. v. State Public Utilities Commission,* 245 U. S. 493, 507, 508. There is no such justification of record here.

Reasonableness

The Federal Commission, having rejected unlawfully, the several petitions to investigate the interstate fares, and its Examiner having rejected evidence as to the interstate rates is now estopped from making its Finding No. 1 on sheet 20 —that the interstate fares are just and reasonable,

There is no evidence to support that finding, other than a mere comparison of interstate with intrastate fares for like distances, which is not sufficient. *Florida v. United States,* 282 U. S. 194, 212.

The fact that the passenger ratios in the war-years are unreasonably low, and the fact that the rates of return on investment are unreasonably high, and the fact that the number of passengers in non-reserved seat and over-crowded coaches has been so great as to reduce greatly the unit expenses per passenger mile in non-reserved seat coaches, present a very strong showing, in the absence of any evidence from the carriers as to present-day costs of coach service in relation to revenues, that the existing intrastate fares are even too high and that the interstate fares (if they be in issue) are unreasonably high for travel in non-reserved seat coaches. These primary facts warrant a reversal of the Commission's Finding No. 1.

The Federal Commission should find that the existing intrastate fares are not unreasonably low but are unreason-

ably high for travel in non-reserved seat coaches; and that the interstate fares (if they be in issue) are unjust and unreasonably high.

[fol. 1008] Distinction Between Reserved and Non-Reserved Seat Travel in Coaches

In lieu of the Federal Commission's Finding No. 3 the Commission should find: that the typical intrastate journey is in overcrowded and disagreeable, non-reserved seat, dirty coaches; and that the value of such service and the expense of such service is much less than the value and the expense of journeys in through, fast, interstate streamlined trains, in comfortable, reclining reserved seats; and that such reserved seat travel is not available to intrastate travelers.

Preference and Advantage

In lieu of the Federal Commission's Finding No. 4, sheet 20, the Commission should find that: There is no Complaint by any interstate traveler, or association of interstate travelers, and no proof whatsoever, that the existing differences between the interstate and the intrastate fares subjects any interstate passenger or person or locality to any undue or unreasonable disadvantage or prejudice, or gives any undue or unreasonable advantage or preference to any intrastate passengers, person or locality; or that the difference in fares causes any substantial injury or damage to any persons or localities in interstate commerce.

The kind of proof which is essential to support a finding of undue preference under Section 13(4) is the same as that which is required under Section 3(1), *Barrett Co. v. Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 334, and such proof of injury is wholly absent in this record. Both sections are intended to remove the same evils; and there is no basis for a laxer rule of evidence in Section 13(4) cases than in Section 3(1) cases. If any differentiation is to be made, stricter proof of real and substantial injury should be required in a Section 13(4) case than in a Section 3(1) [fol. 1009] case for the reason that exclusive jurisdiction over the intrastate rates is vested in the State Authority and cannot be ousted by the force majeure of the Federal power unless the justification of the exercise of the Federal power clearly appears, and unless the exercise of the Federal power is essential "to protect and carry out some

regulation of interstate commerce." *Illinois Commerce Commission v. Thomson*, 318 U. S. 675, 684, 63 S. Ct. 834, 838.

Discrimination. Section 13(4)

The Federal Commission's finding No. 6 of unjust discrimination against interstate commerce, is preceded by and predicated upon the Finding No. 5 that "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service." Both findings should be reversed.

Revenue-Need. Section 15a

The State and Federal Commissioners well know that the term "unjust discrimination" as used in Section 13(4) cases has acquired a very definite meaning and significance through commission and judicial interpretation. "Unjust discrimination" under Section 13(4) carries with it an entirely different concept from the same phrases as used in Section 2 cases. "Unjust discrimination" in Section 13(4) cases means that intrastate rates are depressed to unduly low levels by state authorities, and are so low that they cast a *revenue burden* upon interstate commerce. The theory of such "unjust discrimination" is that shippers in interstate commerce must pay higher rates than they otherwise would, due to the low level of the intrastate rates, in order to bring the aggregate revenues of the carriers *up* to a level which [fol. 1010] will yield them a fair return of 5.75% on the value of their carrier-property. The basis for a finding of "Unjust discrimination" is evidence of the "revenue need" of the carriers to bring their incomes *up* to the fair return as contemplated by Section 15a. Thus there is a dove-tailed relation between "unjust discrimination" under Section 13(4) and Section 15a.

No Revenue Need

Attention is directed to the fact that the Federal Commission, nowhere in its report, finds that the carriers are in need of additional revenue to bring the incomes *up* to the fair return of 5.75%. There were no facts which would support such a finding. The fact is that in the war-years of 1942 and 1943 the carriers, in the aggregate, are earning average rates of return before federal income taxes of

about 18%, or *more than three times the standard rate of return*. There is no revenue need. None was asserted or proven by the carriers. This is not a "revenue" case. Hence, there is no foundation for a finding of "unjust discrimination" within the meaning of that phrase in Section 13(4).

A finding of "unjust discrimination" in a section 13(4) case cannot be sustained unless the facts affirmatively support a finding that the intrastate rates are so low as to cast a burden upon interstate commerce, and that the exercise of the Federal authority to prescribe and raise the intrastate rates is actually required "so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a *fair return* on the value of property devoted to the transportation service, both interstate and intrastate," *United States v. Louisiana*, 290 U. S. 70, 74, 75. *Wisconsin Railroad Comm'n v. C. B. & Q. R. Co.*, 257 U. S. 563, 586, 587, 588, 589, 590; *New* [fol. 1011] *York v. United States*, 257 U. S. 591, 601; *Florida v. United States*, 282 U. S. 194, 211; *Louisiana v. United States*, 284 U. S. 125, 131; *Nashville, C. & St. L. Ry. Co. v. Tennessee* 262 U. S. 318.

There is no proof here that the intrastate rates for travel in non-reserved seat coaches are so low as to cast a burden on interstate commerce; or that the carriers need additional revenue from the intrastate coach travel to *bring up* the aggregate earnings to the point of yielding a fair return. The facts show that the carriers are earning *far in excess of a fair return*, and hence cannot claim the need of revenue.

The Federal Commission's finding is that the "traffic moving under these lower intrastate fares is not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation service."

Attention is directed to the fact that the Commission does not, and could not, find that the intrastate faces which it approved are unreasonably low; that the Commission does not and could not find that the carriers are in need of additional revenue to enable them to earn a fair return of 5.75%. The facts do not support findings which are characteristically requisite to support a section 13(4) order.

The Federal Commission finds that the intrastate fares are not contributing "a fair share of the revenues" to enable them to render "adequate and efficient service." There are no facts of record which in any way tend to prove that the carriers are in need of revenue to enable them to render efficient service. The evidence shows that is the lack of facilities to handle greatly increased travel which causes inadequacy of their services. The measure of the intrastate fares had nothing to do with the inadequacy of passenger [fol. 1012] equipment. Nor will an increase in intrastate fares bring into service any additional equipment. The carriers have hauled out of the dust piles all of the old antiquated coaches in their possession and are permitting those old coaches with non-reserved seats to be overcrowded far beyond their seating capacity. If there is any passenger equipment which is carrying more passengers than ever before in railroad history it is these non-reserved seat coaches. The greatest increase in passenger revenue has come from travelers in non-reserved seat coaches. The increasing of the intrastate fares will bring no new cars to the rails, and will enable no more passengers to ride in the overcrowded coaches.

The finding,—that the increase in the intrastate fares is needed to enable respondents to render "adequate and efficient service,"—is without any foundation in fact or theory. The finding is a strained one and is designed to overcome the inherent weakness in the facts of record and as an excuse for the exertion of the federal power over intrastate commerce. The Finding marks another of the many current attempts being made to broaden and strengthen the Federal power over intrastate commerce and to weaken and emasculate the power of the States to regulate their internal affairs.

There is nothing of substance here to warrant any finding of "unjust discrimination" in the sense that that term has acquired by long years of judicial interpretation.

The finding of unjust discrimination against interstate commerce should be reversed.

Wherefore, North Carolina asks that the Federal Commission extend the period within which to adjust intrastate fares from 30 to 60 days in order that the North Carolina Commission may consider to what extent, if any, the car- [fol. 1013] riers subject to its jurisdiction should be permitted to raise their intrastate coach fares.

North Carolina asks that the proceeding be assigned for further hearing to receive statistical evidence for the complete year 1943, and current months of 1944; and to receive evidence as to the relation between the expense or full distributed cost of travel in reserved and non-reserved seat coaches during the existing war-conditions.

North Carolina asks that the Federal Commission consider its Exception herein to findings of fact and law in the Federal Commission's Report; and that the Federal Commission, after further hearing, bring forward a Proposed Report containing modified findings of fact and law in accordance with the Specific Findings requested herein and in North Carolina's original Brief.

North Carolina asks further that the Four State Fares Cases be reassigned for oral argument after other steps of procedure have been completed; and that, thereafter, the Commission reconsider its six numbered findings, and that it reverse its ultimate Conclusions; and that it enter an order dismissing the carriers' complaint No. 29036.

North Carolina Utilities Commission, Stanley Winborne, Chairman; Fred C. Hunter, Commissioner; R. G. Johnson, Commissioner; H. M. Nicholson, Director of Traffic, Raleigh, N. C.

Raleigh, N. C. April 26, 1944.

Charlotte Shippers & Manufacturers Asso., Inc., W. S. Creighton, Executive Vice Pres., Charlotte, N. C.

North Carolina Division of the Travelers Protective Association of America, B. F. Russell, Chm., Transportation Com., Raleigh, N. C.

[fol. 1014] F. C. Hillyer, 227 West Forsyth St., Jacksonville, Fla.

CERTIFICATE OF SERVICE

This is to certify that I have this date served the foregoing document upon all parties of record by depositing a copy of same properly addressed to each of said parties in the United States Mail.

Dated at Raleigh, North Carolina, this 26th day of April, 1944.

H. M. Nicholson, Registered Practitioner.

[fol. 1015] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

MOTION FOR ENTRY OF ORDER—Filed May 1, 1944

Come now, by counsel, the railroads operating in the State of North Carolina, respondents in the above-entitled proceeding, and respectfully show to the Commission as follows:

I

That in the report of the Commission herein, dated March 25, 1944, it was stated:

> "In accordance with our practice in such proceedings, we shall leave to respondents and the respective State Commissions the matter of adjusting the intrastate fares to conform to these findings. If this is not accomplished within 30 days from the service of this report, consideration will be given to the entry of an appropriate order."

[fol. 1016] Said report was released and served on March 30, 1944.

II

That, no action having been taken by the North Carolina Utilities Commission, counsel for these respondents on April 19, 1944, addressed a letter to said Commission wherein reference was made to the above-quoted language from the report of this Commission, and wherein it was further said:

> "On behalf of the railroads operating in North Carolina, we are writing to advise that they are prepared to adjust the intrastate fares to conform with the findings referred to and within the prescribed time limit of 30 days, if authorized to do so by your Honorable Commission without the entry of a formal order by the Interstate Commerce Commission.
>
> "It is respectfully requested that such authorization be given."

III

That although the time limit of 30 days as fixed by this Commission has now expired, the North Carolina Utilities

Commission has failed to authorize these respondents to adjust the intrastate fares to conform to the findings contained in said report of March 25, 1944, and respondents, therefore, have been and are unable to proceed to so adjust said intrastate fares.

[fols. 1017-1019] IV

The premises considered, these respondents move that the Commission proceed forthwith to enter an appropriate order.

Respectfully submitted, Frank W. Gwathmey, Charles Clark, L. L. Oliver, Attorneys for Respondents.

Washington, D. C., May 1, 1944.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing motion upon all parties to this proceeding by mailing a copy thereof by first-class mail duly addressed to each such party.

Dated at Washington, D. C., this 1st day of May, 1944.

L. L. Oliver.

[fol. 1020] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 28963

Alabama Intrastate Fares

I. C. C. Docket No. 29000

Kentucky Intrastate Fares

I. C. C. Docket No. 29036

North Carolina Intrastate Coach Fares

I. C. C. Docket No. 29037

Tennessee Intrastate Fares

RESPONDENTS' REPLY TO PETITIONS FOR REOPENING REARGUMENT AND RECONSIDERATION—Filed May 5, 1944

Come now the rail carriers in Alabama, Kentucky, North Carolina and Tennessee, respondents in the above-styled

proceedings, and, for their several replies to the petitions of the Alabama Public Service Commission and the Attorney General of Alabama, the Commonwealth of Kentucky and the Railroad Commission of Kentucky, the [fol. 1021] North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., and North Carolina Division of the Travelers Protective Association of America, Railroad and Public Utilities Commission of the State of Tennessee and the Price Administrator for reopening, reconsideration and reargument, respectfully say as follows:

Preliminary Statement

These four proceedings are investigations instituted by the Commission under Section 13(4) of the Act upon petitions by the rail carriers operating, respectively, in Alabama, Kentucky, North Carolina and Tennessee. They all involve the same issues; namely, whether the refusal of the regulatory authorities of the states named to authorize or permit respondents to establish and maintain for intrastate application therein the same passenger fares that are maintained for interstate application to, from, and between points in said states results in a violation of the "persons-and-locality" and "revenue discrimination" provisions of Section 13(4) (sheets 1 and 2). The four cases were heard and briefed separately, but were argued together and decided by the Commission in one report. The evidence adduced in each case was substantially the same (sheet 1).

In its report and order of March 25, 1944, the Commission found that the maintenance by respondents of intrastate fares and charges in these four states on a lower [fol. 1022] level than the corresponding interstate fares and charges results, and will result, in a violation of both the "persons-and-locality" and "revenue discrimination" provisions of Section 13(4). It also found that the intrastate fares and charges should be raised to the interstate level (sheet 21). These findings were made after a careful and painstaking consideration of all the contentions advanced by the state authorities and the Price Administrator (sheets 14-19). The Commission did not enter an order, but left to respondents and the state authorities the matter of adjusting the intrastate fares and charges to conform to its findings (sheet 21).

The several petitions attacking the Commission's decision and asking for reconsideration raise substantially the same issues, except that the petition of the Price Administrator lays particular emphasis upon the alleged inflationary character of an increase of the intrastate fares and charges to the interstate level. We feel that this contention may be disposed of at the outset before we answer those which assail the Commission's findings under Section 13.

In the petition of the Price Administrator it is charged that the Commission erred "as a matter of law and contrary to its own assurances" by failing and refusing to give consideration to the wartime stabilization policy as declared by Congress in Section 1 of the Stabilization Act of October 2, 1942, and that the Commission's decision "is an unwarranted interference with the cooperation between [fol. 1023] the President of the United States and the State Commissions in the efforts of the latter to aid in the effective prosecution of the war" (page 2).

If any answer to such unwarranted charges is required, we think we need only call attention to the fact that there is no evidence in these cases to show that increasing the intrastate passenger fares in Alabama, Kentucky, North Carolina and Tennessee to the level of the fares now applicable interstate throughout the United States, and intrastate in the other forty-four states of the Union, would be inflationary in any degree. The Price Administrator offered no evidence as to inflation in any of the proceedings. The only testimony as to inflation appearing in the record in any of the cases is that of a witness for the Price Administrator who appeared in the proceeding before the Alabama Public Service Commission. His testimony, together with the testimony of all of the other witnesses in that proceeding, was introduced by the Alabama Commission as Exhibit 18 in Docket 28963. The showing there made was that all inter-city railroad passenger fares are weighted in the cost of living index at one-tenth of one per cent. The witness had made no computation as to the weight which should be given in the cost of living index to intrastate passenger fares in Alabama, but he admitted that it would be "substantially less" than one-tenth of one per cent. Clearly, such a showing is insufficient to prove that the increases here authorized in intrastate fares would be in- [fol. 1024] flationary.

A further complete answer to the charges of the Price Administrator is that the question of whether or not the authorized increases in passenger fares would have an inflationary effect has already been determined by the Commission adversely to his contention in Ex Parte 148. See *Increases in Texas Rates, Fares and Charges,* 253 I. C. C. 723, 734-735. Moreover, Section 13(4) of the Interstate Commerce Act imposes upon the Commission the positive obligation of removing any undue or unreasonable disadvantage or prejudice to persons or localities in interstate commerce, or any undue, unreasonable, or unjust discrimination against interstate commerce, resulting from the maintenance of lower intrastate rates, fares and charges imposed by state authorities. As stated in *Increases in Utah Freight Rates and Charges,* 255 I. C. C. 97, 100-101:

> "The maintenance by common carriers by railroad of any rate which causes any undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, is expressly forbidden and declared to be unlawful by Section 13(4) of the Interstate Commerce Act. The Congress has not suspended, or authorized us to suspend, the operation of that section of the act. The standards and principles by which we are governed in the administration of that section are well established by our findings in other similar proceedings, many of which have been reviewed and sustained by the Supreme Court. * * *"

The other contentions of the petitioners may be summarized as follows:

[fol. 1025] 1. That the evidence does not establish the reasonableness of the interstate fares and charges which respondents are authorized to charge;

2. That the evidence is not sufficient to justify a finding that the present intrastate fares and charges cause and will cause any undue or unreasonable advantage to, or preference of, persons in intrastate commerce, on the one hand, or any undue or unreasonable disadvantage to, and preju-

dice against, persons in interstate commerce, on the other hand; and

3. That the evidence is insufficient to justify a finding of undue, unreasonable or unjust discrimination against interstate commerce.*

We shall deal separately with each of the contentions we have enumerated.

I

The Reasonableness of the Interstate Fares and Charges

There is no merit whatever in the contention that the evidence fails to show the reasonableness of the interstate [fol. 1026] fares and charges which these respondents are authorized to apply in Alabama, Kentucky, North Carolina and Tennessee. In its report (sheets 2 to 4) the Commission gives the history of these fares and charges, and on sheets 4 to 10, under the heading "Level of the Interstate Fares," the reasonableness of said fares and charges and the results of respondents' passenger operations during the years 1936-1942, inclusive, are discussed at length.

It is not necessary for us to repeat here what the Commission said. It is sufficient to point out that heretofore the intrastate fares in Alabama, Kentucky, North Carolina and Tennessee have been the same as the interstate fares (sheet 11); that the present intrastate coach fares applicable on respondents' lines within those states are subnormal fares established primarily to attract traffic that had been diverted to private automobiles (sheet 14); and that a basic coach fare of 2 cents per mile was found reasonable by the Commission for application throughout the United States, including these four states, in *Passenger Fares and Surcharges*, 214 I. C. C. 174. The fares found reasonable in the case just cited were permitted to be increased 10 per cent in Ex Parte 148 (248 I. C. C. 545, 565, 566), and these respondents were authorized to bring their

*Some of the petitions also attack certain preliminary findings of the Commission, but it is not felt necessary to deal with these separately. They will be covered, to the extent deemed necessary, by what is said in support of the Commission's ultimate findings.

interstate fares up to the normal level (sheets 3-4). In its report on further hearing in Ex Parte 148 (255 I. C. C. 357), which was decided on April 6, 1943, the Commission de-
[fol. 1027] clined to suspend the increases theretofore granted in passenger fares.

In its opinion in the instant cases the Commission states (sheet 10):

> "The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra,* plus the 10 per cent increase authorized in Ex Parte 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents."

Not only do the interstate fares which the Commission here finds reasonable for intrastate application apply in all of the states of the United States, except the four involved in these proceedings, but these fares also apply intrastate on the lines of certain railroads operating in each one of said four states. In Alabama a coach fare of 2.2 cents applies intrastate on the Gulf, Mobile and Ohio Railroad, the Illinois Central Railroad and the St. Louis-San Francisco Railway, except in instances where these lines meet the 1.65-cent fare of competing lines (sheet 11). In Kentucky an intrastate coach fare of 2.2 cents, subject to the same exception, applies on the Gulf, Mobile and Ohio Railroad and the Illinois Central Railroad, and also on
[fol. 1028] the Chesapeake and Ohio Railway, except on its Louisville-Winchester line (sheet 11). In Tennessee an intrastate coach fare of 2.2 cents per mile, subject to the exception first mentioned, applies on the Illinois Central

Railroad, the Gulf, Mobile and Ohio Railroad and the St. Louis-San Francisco Railway (sheet 12), and in North Carolina the intrastate one-way and round-trip fares of the Norfolk & Western are the same as the interstate fares (sheet 12). Since the intrastate fares in each of these states are maintained by authority of the regulatory bodies of those states, we are at a loss to understand how they can contend seriously that such fares are not reasonable.

II

Undue and Unreasonable Prejudice and Preference as Between Persons in Interstate and Intrastate Commerce

In its report the Commission points out that the respondents in each of the four states are engaged in the handling of both intrastate and interstate passengers; that such passengers are carried on the same trains and generally in the same cars, but that the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances (sheet 13). It then gives illustrations of the differences in the fares paid by interstate and intrastate passengers traveling approximately the same distances. The Commission also gives illustrations to show the differences in the one-way fares over intrastate and [fol. 1029] interstate routes between points in the same states, and points out that similar situations are shown with respect to round-trip fares (sheet 13). It direct- attention to the fact that all trains operated by respondents in each of the states are available to, and are used by, both interstate and intrastate passengers, and that the services accorded to both classes of passengers are substantially the same. It then states:

> "The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (sheet 13).

It is difficult to see how evidence could show more clearly the preference to intrastate passengers and intrastate

routes, and the prejudice against interstate passengers and interstate routes, than does that mentioned by the Commission. But the state authorities and Price Administrator contend that the evidence is insufficient, in that no passenger or prospective passenger complained of the differences in rates, and no actual damage to interstate passengers was shown specifically. They do not, and can not, contend that the differences in the existing fares and charges are just or reasonable and their entire argument is hypertechnical in the extreme.

It seems to us that the damage to the interstate passengers and the interstate routes is obvious, and that it [fol. 1030] would have been a waste of time and effort to have interstate passengers or prospective passengers at the hearings to testify to the obvious. This position finds support in decisions of this Commission and the Courts (see sheet 20). In our exceptions we cited a total of at least twenty-five earlier cases in which, upon precisely the same sort of showing that has been made here, the Commission had no hesitancy about making findings of unlawful preference and prejudice as between persons under Section 13(4) of the Act (see respondents' exceptions to the examiner's proposed report in Docket 28963, pp. 9-13). These exceptions also contain quotations from several of the prior decisions. We do not believe it is necessary to reproduce those quotations here, but we do wish to direct particular attention to the recent case of *Rhode Island Commutation Fares*, 253 I. C. C. 383, 389, where the Commission stated:

> "The foregoing illustrations are typical of others where, for the same or even shorter distances, interstate commuters now pay more than intrastate commuters traveling on the same kind of ticket subject to like restrictions. In other words, the interstate and intrastate commuters ride on the same train, yet for identically the same service the interstate passenger is required to pay a higher rate of fare than the intrastate passenger. *A little deductive reasoning is all that is required to spell out of those facts the undue prejudice and disadvantage and the undue preference and advantage forbidden by section (13)4 of the Act.*
>
> "No one contends that the economic condition of the average intrastate commuter is any different from that

of the interstate commuter. Plain justice demands, [fol. 1031] therefore, that the 10-percent increase be paid by both or by neither. In view of our findings in Ex Parte No. 148 in respect of the need for an increase in the interstate fares, and in the light of this record, it is clear that the only reasonable and lawful course to pursue is to require a like increase in these intrastate fares." (Emphasis supplied.)

It can not be doubted that the power of this Commission under Section 13(4) "is broader than it is under Section 3(1)" (Mr. Commissioner Splawn in No. 28791, *Intrastate Rates, Road Aggregates in Georgia*). It is to be noted that throughout Section (3)1 the word "particular" appears. It is made unlawful for any common carrier to make, give or cause any undue or unreasonable preference or advantage to "any *particular* person, company, etc." In Section 13(4), on the other hand, the word "particular" does not appear. The prohibition there is against *any* undue or unreasonable advantage, preference or prejudice "as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

The broader scope of Section 13(4) is also indicated by the fact that its purpose is to foster and protect interstate commerce and the national transportation system, whereas the purpose of Section 3(1) is to prevent undue preference and prejudice as between shippers or passengers. To hold that Section 3(1) and that portion of Section 13(4) which deals with preference and prejudice as between persons and localities mean precisely the same thing would be equivalent to saying that Congress had indulged in need- [fol. 1032] less repetition and that the differences in the language used mean nothing.

But whether or not the power of this Commission under Section 13 is broader than it is under Section 3, the evidence in the instant cases is sufficient to justify a statewide order under the "persons-locality" provision of Section 13(4). The Commission has found, and it is a fact, that interstate and intrastate passengers are carried on the same trains and generally in the same cars; that all trains operated by respondents in each of the states are available to, and are used by, both interstate and intrastate passengers; that the services accorded to both classes

of passengers are substantially the same; and that prejudice against the interstate passenger and preference in favor of the intrastate passenger exists "*on every mile of track operated in passenger service by each of the respondents in all four of these states,* excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (sheet 13). A difference in fares under these circumstances is manifestly preferential and prejudicial. And the damage to the interstate passengers resulting therefrom is made plainer by the fact that the volume of interstate and intrastate passenger traffic over respondents' lines is large and the difference in the charges paid by the two classes of passengers is great.

In Alabama, for example, the amount paid by the intrastate passengers under the existing fares is at least $725,000 [fol. 1033] per annum less than it would be if the Alabama intrastate fares were upon the interstate level (sheet 21). Since a large part of the intrastate travel in Alabama is for business purposes, there can be no question about the fact that many persons traveling within that state have a direct monetary advantage over their interstate competitors. This advantage benefits them and damages their competitors. Moreover, every intrastate passenger in Alabama gets more for his money than do interstate passengers traveling on the same train and perhaps in the same seat.

In *Increases in Texas Rates, Fares and Charges,* 253 I. C. C. 723, the Commission referred to the prohibitions of preference or prejudice as between persons, places and localities, and stated (p. 735):

> "The idea of magnitude implied by the term 'gross inequalities' is not the chief criterion by which these evils are to be measured. The prohibitions of the statute are aimed, rather, at all those forms and manifestations of discrimination in this category of an injurious nature, whether gross or small, which do not rest upon actual differences in transportation conditions sufficient to justify them."

The views taken by petitioners of the "persons-locality" provision of Section 13(4) are too narrow. The Supreme Court's opinion in *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, leaves no doubt as to the power of the Commission to make a state-wide order under

this part of Section 13(4) upon a finding of "typical in-[fol. 1034] stances" which are sufficient to justify "general findings." In that case the Court was dealing primarily and particularly throughout the opinion with the so-called "persons-locality" provision of Section 13(4) and upheld an order of this Commission under that provision which was state-wide in its scope. In the course of its opinion, the Court said:

> "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579, 66 L. ed. 371, 379, 22 A. L. R. 1086, 42 S. Ct. 232. Compare Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 83, ante, 221, 228, 51 S. Ct. 1. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. *To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief.*" (Emphasis supplied.)

And the Court further said (p. 772):

> "The order here challenged is statewide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order, otherwise valid and practicable of operation over a wide territory."

The facts in the instant cases are even stronger than they were in the *Georgia Public Service Commission Case*, because, as the Commission has found, the conditions surrounding the transportation of interstate and intrastate passengers are not in any instances "divergent," but are substantially the same.

[fol. 1035]

III

Discrimination Against Interstate Commerce

Upon the issue of undue discrimination against interstate commerce, i. e., so-called "revenue discrimination", the Commission found (sheet 21):

> "Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service."

The Commission also pointed out (sheet 14) that the intrastate fares in each of the states may be used to defeat or break down the interstate fares and thereby reduce the revenues on interstate traffic; that passengers can avoid paying the higher interstate fares by using the cheaper intrastate routes between points in the same states; and that "an increase in the intrastate fares to the interstate level under existing conditions, respondents insist, will not result in any important loss of traffic to other forms of transportation", and will produce increased revenues.

The position of the petitioners is that respondents are now earning a fair return from their passenger operations, that they do not need additional revenue and that, under these circumstances, the Commission is without power to require increases in intrastate fares under the so-called [fol. 1036] "revenue discrimination" provisions of Section 13(4). This position is, we submit, clearly erroneous.

In Ex Parte 148, *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545, the Commission, after a most extensive investigation of freight rates and passenger fares throughout the country, entered on January 21, 1942, a preliminary order approving and authorizing a general increase of 10 per cent in passenger fares as proposed by the carriers. In this order it was recited:

> "That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred

or to be incurred by said petitioners because of the payment by them of (a) increased wages to employees, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges."

And in said order the Commission further said:

> *"And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful."* (Emphasis supplied.)

Thereafter, in the report of March 2, 1942, in the same proceeding, the Commission reaffirmed this finding, saying:

> *"Because of the abnormal conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger* [fol. 1037] *service justly and reasonably should contribute toward meeting the added operating costs of the railroads."* (Emphasis supplied.)

Subsequently, by order dated January 4, 1943, Ex Parte 148 was reopened by the Commission for further hearing in response to petitions filed by the Office of Price Administration and others. In its report of April 6, 1943 (255 I. C. C. 357), in the reopened proceeding, the Commission suspended until January 1, 1944, the increases in the freight charges previously authorized and cancelled the increases authorized in passenger commutation fares. But it declined to modify its previous findings with respect to standard passenger fares, calling attention to the fact that passenger traffic had failed for many successive years to pay its proper share of railway expenses (255 I. C. C. 394-395).

In its third and latest report in Ex Parte 148 (256 I. C. C. 502), the Commission again found that the revenues which

the railroads may reasonably be expected to receive, from freight and passenger traffic alike, *are needed* for the maintenance of a transportation system adequate to meet the demands that are being made on it during the period of the existing emergency. This finding was made in the light of the latest available data, as shown by the following quotation from the report (p. 505):

> "We have given further consideration to the evidence in this proceeding, including current statistical data in the way of the specified periodical reports of the petitioners which it was earlier stipulated we might [fol. 1038] consider, and also to the returns to the show-cause order."

Thus, it is clear that the Commission is of the opinion and has found repeatedly, that the carriers need the revenue they may be expected to receive from the increased passenger fares authorized in Ex Parte 148 (See, also, sheets 19-20).

When these findings were made the Commission contemplated that the interstate and intrastate passenger fares should be upon the same level. This is shown by its report in *Increases in Texas Rates, Fares and Charges*, 253 I. C. C. 723, 736, where it was stated:

> "The petition filed by the carriers with us on December 13, 1941, seeking increases in their rates, fares, and charges on interstate traffic, docketed as Ex Parte No. 148, was so limited because of our jurisdiction, but it reflected the proposal of the carriers to make the increases Nation-wide and indicated their purpose to petition the respective State Commissions for like increases on intrastate traffic."

The contention that, merely because passenger operations as a whole, both state and interstate, have been profitable during recent periods, the states are free to require the carriers to maintain intrastate fares lower than the prevailing interstate fares leads obviously to the absurd conclusion that in such times of prosperity the states could require passengers to be hauled for nothing—or at least for fares barely above the limit of actual confiscation. Such a contention is plainly at variance with the rule, repeatedly announced by the Supreme Court, that intrastate traffic shall contribute

[fol. 1039] "its fair proportionate share" of the cost of maintaining an adequate transportation system. Such a requirement has no necessary relation to either rates of return or revenues in the aggregate, regardles of what the latter may happen to be.

It would follow from petitioners' argument that the railroads would have to be approaching the stage of actual bankruptcy before any order under Section 13 of the Act could ever be made by this Commission.

Moreover, petitioners' argument is erroneous in that it ignores, and accords no weight to, the national transportation policy. That policy requires, among other things, that the Act be so administered as to promote safe, adequate, economical and efficient service and to foster sound economic conditions in transportation and among the several carriers, to the end of developing, coordinating and preserving a national transportation system adequate to meet the needs of the commerce of the United States, and of the Postal Service and the national defense. All the provisions of the Act are required to be administered and enforced with a view to carrying out the national transportation policy.

It is clear, we think, that in order to promote sound economic conditions in transportation and to develop and preserve a national transportation system adequate to the needs of the country, the Commission is not only required to consider the current earnings of the carriers, but must [fol. 1040] also consider their past earnings and probable future financial requirements. It is well known that the carriers have not been able during the present emergency period to maintain their properties and equipment at the usual standard; that the wear and tear on their properties and equipment have been unusually great; that they have been unable to obtain much needed equipment; and that these facts have resulted in their rates of return being overstated. See *Increases in Texas Rates, Fares and Charges*, 253 I. C. C. 723, 731-732. It is also well known that after the war the carriers must inaugurate extensive rehabilitation and improvement programs, and must obtain much new and modern equipment. Nevertheless, due to increased expenses and taxes, the net railway operating income of the railroads in the southern region has decreased materially in recent months, having dropped from $28,578,717 in December, 1942, to $11,035,942 in December, 1943 (sheet 8).

What we have said shows that the adequacy of the revenues received by the carriers cannot be determined by considering solely their present rates of return, but must be considered also in the light of their probable future needs and earnings. And it is manifest that intrastate traffic must pay its "fair proportionate share" of the cost of maintaining and preserving a railway system adequate for present and future needs.

Wherefore, the premises considered, respondents pray that the petitions of the Alabama Public Service Commis-
[fol. 1041] sion and the Attorney General of Alabama, the Commonwealth of Kentucky and the Railroad Commission of Kentucky, the North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., and North Carolina Division of the Travelers Protective Association of America, Railroad and Public Utilities Commission of the State of Tennessee and the Price Administrator be denied.

Respectfully submitted, W. A. Northcutt, Frank W. Gwathmey, Charles Clark, James B. Gray, Y. D. Lott, Jr., Edward D. Mohr, L. L. Oliver, Chas. P. Reynolds, Attorneys for Respondents.

Washington, D. C., May 5, 1944.

[fols. 1042-1043] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at Washington, D. C., this 5th day of May, 1944.

Chas. P. Reynolds.

[fol. 1044] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

REPLY TO RAILROADS' MOTION FOR ENTRY OF THE 13TH-SECTION ORDER—Filed May 10, 1944

The North Carolina Utilities Commission, against which the Railroads' proposed 13th-Section order would run, replying to the Railroads' motion, dated May 1, 1944, and received May 4, 1944, prays that the said motion be denied.

Subsequent to the issuance of the report of the Commission in the above entitled proceeding the North Carolina Utilities Commission requested of the railroads that they furnish additional statistical data to the North Carolina Commission in order that the North Carolina Commission might give consideration to the matter of adjusting the intrastate fares in relation to the findings of the Interstate Commerce Commission. The railroads failed or declined to furnish such statistical information.

Prior to May 1st the North Carolina Utilities Commission filed a petition in the above entitled proceeding seeking an extension of the thirty-day period within which to adjust certain intrastate fares; for further hearing to receive supplemental evidence; for modification of certain findings; for reargument and for reconsideration. The North Carolina Commission is informed and believes that copies of its said petition were received by the railroads prior to the [fol. 1045] filing of their motion or entry of order dated May 1st.

The granting of the railroads' motion for entry of an order, under the circumstances narrated, would be the equivalent of the failure or refusal of the Interstate Commerce Commission to give due consideration to the North Carolina Utilities Com-ission's petition.

North Carolina Utilities Commission, Stanley Winborne, Chairman; Fred C. Hunter, Commissioner; R. G. Johnson, Commissioner; H. M. Nicholson, Director of Traffic, Raleigh, N. C.

J. C. B. Ehringnaus, Wachovia Bank Building, Raleigh, N. C. F. C. Hillyer, 227 West Forsyth St., Jacksonville, Fla.

May 9, 1944.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing reply to the railroads' motion upon all parties to this proceeding, by mailing copies thereof by first-class mail, properly addressed, to each of such parties.

Dated at Raleigh, N. C., this 9th day of May, 1944.

H. M. Nicholson.

[fol. 1046] At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of May, A. D. 1944.

No. 28963

ALABAMA INTRASTATE FARES

No. 29000

KENTUCKY INTRASTATE FARES

No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

No. 29037

TENNESSEE INTRASTATE FARES

CORRECTED ORDER

These proceedings having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission, on March 25, 1944, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

It appearing, That as set forth in said report, and in accordance with the practice in such proceedings, the Commission left to respondents herein and the respective State Commissions for a period of 30 days from March 30, 1944, the date of service of said report, the matter of adjusting the intrastate passenger fares under consideration in these proceedings to conform to the findings and conclusions made in said report, and that no such adjustment of the said intrastate fares has been made or authorized by the respective State Commissions:

[fol. 1047] *It is ordered*, That respondents in each of these proceedings, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 1, 1944, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain, from practicing the undue prejudice and preference and the unjust discrimination found in said report to exist.

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 1, 1944, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, passenger fares for intrastate transportation in the respective States which shall be on bases no lower than the passenger fares presently maintained and applied by the respective respondents for like accommodations in interstate transportation to, from, and through the respective States; provided, that the resulting aggregate charge made by any of said respondents for intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent in interstate transportation to, from, or through such State.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 1048] At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C. on the 8th day of May, A. D. 1944.

No. 28963

ALABAMA INTRASTATE FARES

No. 29000

KENTUCKY INTRASTATE FARES

No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

No. 29037

TENNESSEE INTRASTATE FARES

ORDER DENYING PETITIONS FOR RECONSIDERATION

Upon consideration of petitions (1) of the Alabama Public Service Commission et al. in No. 28963 for reconsideration, rehearing and further order; (2) of the Common-

wealth of Kentucky and Railroad Commission of Kentucky in No. 29000 for reargument and reconsideration; (3) of the North Carolina Utilities Commission et al in No. 29036 for reconsideration, reargument, further hearing, etc.; (4) of the Railroad and Public Utilities Commission of the State of Tennessee in No. 29037 for reconsideration; and (5) of the Price Administrator in each of the above-entitled proceedings for reconsideration; together with respondents' reply to the foregoing petitions; and upon further consideration of the record in these proceedings:

It is ordered, That the aforesaid petitions be, and they are hereby, denied.

By the Commission:

W. P. Bartel, Secretary. (Seal.)

[fols. 1049-1050] INTERSTATE COMMERCE COMMISSION

No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

In the matter of the request of the Court for postponement of the effective date of the order in the above-entitled proceeding.

Present: Claude R. Porter, Commissioner, to whom the above-entitled matter has been assigned for action thereon

ORDER EXTENDING EFFECTIVE DATE OF CORRECTED ORDER

Upon consideration of the request of Circuit Judge Parker that the effective date of the Commission's order of May 8, 1944, in the above-entitled proceeding be postponed, and for good cause appearing:

It is ordered, That the order of this Commission of May 8, 1944, presently effective July 1, 1944, be, and it is hereby, modified so as to become effective August 1, 1944.

Dated at Washington, D. C., this 7th day of June, 1944.

By the Commission, Commissioner Porter.

W. P. Bartel, Secretary. (Seal.)

[fol. 1051] NORTH CAROLINA UTILITIES COMMISSION

OFFER IN EVIDENCE

Raleigh, April 8, 1944.

Mr. Lewis F. Ormond, Comptroller; A. C. L. R. R. Co., Wilmington, N. C.

DEAR SIR:

You are requested to furnish the Commission the following data relative to the operation of your deluxe, *reserved seat* passenger service during the calendar year 1943:

1. Passenger revenue
2. Passenger car miles
3. Passenger miles

A reply at your earliest convenience containing the requested information would be appreciated.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKB

[fol. 1052] Atlantic Coast Line Railroad Company, Office of Comptroller

Lewis F. Ormond, Comptroller

Wilmington, N. C., April 11, 1944.

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, North Carolina.

DEAR SIR:

Receipt is acknowledged of your letter of April 8th, requesting information as to Passenger revenue, Passenger car miles, and Passenger miles, from operation of our deluxe, reserved seat passenger service during the year 1943.

I regret to advise that the information requested is not available and I doubt if it could be completely or accurately compiled at this time. Owing to war time conditions under

which we are operating, we have been compelled to curtail to a considerable extend our accounting statistics of passenger train operations.

As information in this connection, I might add that also owing to war conditions we operated during 1943 certain trains made up of both streamlined and conventional type coaches in which reserved seats were sold.

Yours very truly, (S.) Lewis F. Ormond, Comptroller.

ast

[fol. 1053] NORTH CAROLINA UTILITIES COMMISSION

Raleigh, April 8, 1944.

Mr. A. J. Pharr, Comptroller, Louisville & Nashville R. R. Co., Louisville, Ky.

DEAR SIR:

You are requested to furnish the Commission the following data relative to the operation of your *deluxe, reserved seat passenger service* during the calendar year 1943:

1. Passenger revenue.
2. Passenger car miles.
3. Passenger miles.

A reply at your earliest convenience containing the requested information would be appreciated.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKB.

[fol. 1054] LOUISVILLE & NASHVILLE RAILROAD COMPANY, ACCOUNTING DEPARTMENT

A. J. Pharr, Comptroller

Louisville, Ky., April 13, 1944.

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, N. C.

DEAR SIR:

Reference is made to yours of the 8th instant, in which you request that we furnish you certain data relative to

operation of the deluxe, reserved seat passenger service on the lines of this company during the year 1943.

I regret to advise that our passenger traffic statistics are not kept by trains and it is impossible for me to furnish you the data required. As you probably know, this company operates only 12.95 miles in the State of North Carolina, a part of a branch from Blue Ridge, Ga., to Murphy, N. C.

Yours truly, (S.) A. J. Pharr, Comptroller.

[fol. 1055] North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. C. C. Wimmer, Auditor, Seaboard Air Line Railway, Portsmouth, Va.

Dear Sir:

You are requested to furnish the Commission the following data relative to the operation of your *deluxe, reserved seat passenger service* during the calendar year 1943:

1. Passenger revenue
2. Passenger car miles
3. Passenger miles

A reply at your earliest convenience containing the requested information would be appreciated.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKB.

[fol. 1056] Seaboard Air Line Railway

L. R. Powell, Jr. and Henry W. Anderson, Receivers

C. C. Wimmer, Auditor

Portsmouth, Va., April 15, 1944. s 3450-A.

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, N. C.

Dear Sir:

Referring to your letter of April 8 in which request is made for certain data with respect to the operations of our streamline trains.

The trains to which you refer carry both coach and Pullman passengers and it is not clear whether the information you desire relates to both coach and Pullman service. I should also like to know whether the data requested is for intrastate or interstate travel.

If you will advise me more specifically as to just what information is desired and the purpose for which it is intended to be used, I will be glad to give your request further consideration. However, it is doubtful if the information requested is available as we are not required to currently compile and publish such statistics by trains.

Yours very truly, (S.) C. C. Wimmer, Auditor.

[fol. 1057] NORTH CAROLINA UTILITIES COMMISSION

Raleigh, April 20, 1944.

Mr. C. C. Wimmer, Auditor, Seaboard Air Line Railway, Portsmouth, Va.

DEAR SIR:

Yours April 15th, file 3450-A.

The revenue and statistical date requested in mine of April 8th related solely to *reserved seat coach* service for which coach fares are collected. Where reserved seat coaches are handled in trains with pullman cars or with non-reserved seat coaches, the figures are desired for traffic handled in the reserved seat coaches only.

The data requested is for your entire system operation during 1943 both intra and interstate.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKB.

[fol. 1058] SEABOARD AIR LINE RAILWAY

C. C. Wimmer, Auditor

Portsmouth, Va., May 1, 1944. 1 3450-A.

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, N. C.

DEAR SIR:

Referring to your letter of April 20th relating to data you desire with respect to reserved seat passenger coach service operated by the Seaboard.

Certain of the data which you requested can only be obtained during the time the tickets which are lifted on each train are held intact, and certain other data can be compiled at some additional expense and considerable time of our forces who are already heavily burdened, therefore, before proceeding further, will you please advise me for what purpose the information is requested, also advise if other railroads who operate competitive service in the territory served by the Seaboard will likewise supply data of the character which you have requested the Seaboard to furnish.

Yours very truly, (S.) C. C. Wimmer, Auditor.

[fol. 1059] North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. W. H. Luckett, General Auditor, Southern Railway, Washington 13, D. C.

DEAR SIR:

You are requested to furnish the Commission the following data relative to the operation of your *deluxe, reserved seat passenger service* during the calendar year 1943:

1. Passenger revenue.
2. Passenger car miles.
3. Passenger miles.

A reply at your earliest convenience containing the requested information would be appreciated.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKD

[fol. 1060] Southern Railway System, Office of General Auditor

G. H. Luckett, General Auditor; J. C. Naughten, Assistant General Auditor

Washington(13), D. C. April 12, 1944.

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, North Carolina

DEAR SIR:

Receipt is acknowledged of your letter of April 8th requesting that we furnish the Commission data relative to the operation of deluxe, reserved seat passenger service during the calendar year 1943:

1. Passenger revenue.
2. Passenger car miles.
3. Passenger miles.

Due to the enormous increase in our passenger traffic and the substantial reductions in our trained personnel, it became necessary for us to discontinue the compilation of statistics showing passenger revenue, passenger car miles, and passenger miles by individual trains, and for this reason I regret to advise that the information requested by you has not been compiled and it would be impossible for us to compile it at this date.

Very truly yours, (S.) W. H. Luckett, General Auditor.

[fol. 1061] North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. Chas. Hewett, General Auditor, Clinchfield Railroad Company, Erwin, Tenn.

DEAR SIR:

The Commission is desirous of obtaining the following comparative data relative to the operation of your entire

road for the calendar years 1942 and 1943, separately, in advance of the filing, of your 1943 Annual Report:

1. Rate of return on investment for your property as a whole—as reported to the Interstate Commerce Commission.

2. Operating ratio.

3. Freight Operating ratio.

4. Passenger operating ratio.

You are requested to furnish these figures to the Commission at your very earliest convenience.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKB

[fol. 1062] North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. G. C. Reville, General Auditor, Norfolk Southern Railway Co., Norfolk 10, Va.

Dear Sir:

The Commission is desirous of obtaining the following comparative data relative to the operation of your entire road for the calendar years 1942 and 1943, separately, in advance of the filing of your 1943 Annual Report:

1. Rate of return on investment for your property as a whole—as reported to the Interstate Commerce Commission.

2. Operating ratio.

3. Freight operating ratio.

4. Passenger operating ratio.

You are requested to furnish these figures to the Commission at your very earliest convenience.

Yours very truly, (S.) H. M. Nicholson, Director of Traffic.

FAD:MKD

[fols. 1063-1064] North Carolina Utilities Commission

I, R. O. Self, Chief Clerk of the North Carolina Utilities Commission, do hereby certify the foregoing and attached (12) sheets to be a true copy from the records of this office, *viz:*

Correspondence in re request of Commission for data relative to operation of deluxe, *reserved seat* passenger service during calendar year 1943—North Carolina Intrastate Coach Fares—Docket No. 2789.

In Witness whereof I have hereunto set my hand and affixed the official seal of the Commission.

Done in office at Raleigh, this twenty-fourth day of June in the year of our Lord 1944.

R. O. Self, Chief Clerk.

[fol. 1065] Offer in Evidence.

State of North Carolina,
County of Wake:

Supplemental Affidavit of Frank A. Downing

Before me, a Notary Public in and for the State of North Carolina, personally appeared Frank A. Downing, who being by me first duly sworn deposes and on oath says: That he is Senior Rate Specialist employed by the North Carolina Utilities Commission; that he has prepared from annual and monthly reports of the carriers regularly filed with the Interstate Commerce Commission a statement marked Appendix A, showing method of computing expenses per coach passenger mile for the A. C. L., L. & N., S. A. L., and Southern Railways for the years 1942 and 1943, which is marked Appendix A and is attached hereto and made a part hereof; and a statement of the rates of return of the four said carriers for the years 1942 and 1943, marked Appendix B and attached hereto and made a part hereof by reference; and that the resulting average cost of transporting a coach passenger one mile over any of the four said carriers was seventy-seven hundredths (.77) of one cent during the calendar year 1942 and sixty-three hundredths (.63) of one

cent during the calendar year 1943; and that the average rate of return of the four said carriers shown in Appendix B hereto was for the year 1942, 14.16% and for the year 1943 18.09%.

Frank A. Downing.

Subscribed and sworn to before me this 30th day of June, 1944. O. LeGrand Ellington, Notary Public. (Seal.) My Commission expires Oct. 28, 1944.

APPENDIX A

	(1) Total Expenses Assigned and Apportioned To Passenger Service (Dollars)	(2) Passenger Car-Miles	(3) Expense Per Passenger Car-Mile (Cents)	(4) Total Passenger Miles In Coaches	(5) Total Passenger Coach Miles	(6) Passenger-Miles Per Car-Mile In Coaches	(7) Expense Per Coach Passenger-Mile (Cents)
			Calendar Year 1942				
A. C. L. R. R.	20,093,035	94,949,819	21.16	971,980,340	31,353,218	31.00	0.68
L. & N. R. R.	21,119,018	85,444,354	24.72	799,991,335	30,610,537	26.13	0.95
S. A. L. Ry.	19,766,891	80,937,934	24.42	866,152,259	25,727,418	33.67	0.73
Sou. Ry.	25,863,988	107,069,739	24.16	1,188,107,590	36,948,752	32.16	0.75
Total—4 Roads	86,842,932	368,401,846	23.57	3,826,231,524	124,639,925	30.70	0.77
			Calendar Year 1943				
A. C. L. R. R.	27,497,380	109,225,852	25.17	1,608,034,835	38,757,364	41.49	0.61
L. & N. R. R.	27,693,892	100,426,795	27.58	1,800,542,707	39,227,465	45.90	0.60
S. A. L. Ry.	25,559,619	92,536,974	27.62	1,487,192,154	32,966,302	45.11	0.61
Sou. Ry.	33,644,477	120,411,468	27.94	1,916,816,426	47,278,298	40.54	0.69
Total—4 Roads	114,395,368	422,601,089	27.07	6,812,586,122	158,229,429	43.06	0.63

Source: Column (1)—Annual Reports to the Interstate Commerce Commission, page 301, Item 4.
Column (2)—Annual Reports to the Interstate Commerce Commission, page 508, Items 42–47, inclusive.
Column (4)—Monthly Form APT Reports for December 1943, to the Interstate Commerce Commission.
Column (5)—Annual Reports to the Interstate Commerce Commission, page 508, Col. (d), Item 42 and 1/2 Item 47.

Computations: Column (3) equals Column (1) divided by Column (2).
Column (6) equals Column (4) divided by Column (5).
Column (7) equals Column (3) divided by Column (6).

Raleigh, N. C.
June 28, 1944.

[fols. 1067-1068]

APPENDIX (Amended) B

Road	(1) Investment In Transportation Property as of December 31st (Dollars)	(2) Depreciation and Amortization of Defense Projects—Accrued as of December 31st (Dollars)	(3) Cash, Materials and Supplies as of December 31st (Dollars)	(4) Net Book Investment Plus Cash, Materials and Supplies as of Dec. 31st (Dollars)	(5) Net Railway Operating Income Before Federal Income Taxes Calendar Year (Dollars)	(6) Rent for Leased Roads Calendar Year (Dollars)	(7) Net Railway Operating Income Before Federal Income Taxes, Less Rent For Leased Roads, Calendar Year (Dollars)	(8) Rate of Return (Percent)
				1942				
A. C. L. RR.	288,086,363	36,449,291	24,769,153	276,406,225	41,883,550	227,776	41,655,774	15.07
L. & N. RR.	468,137,904	102,612,783	42,474,392	407,999,513	61,810,790	307,085	61,503,705	15.07
S. A. L. Rwy.	277,935,537	34,892,446	21,717,174	264,760,265	35,127,070	591,117	34,535,953	13.04
Southern Rwy.	553,361,481	48,237,142	33,396,778	538,521,117	75,590,818	2,618,373	72,972,445	13.55
Total—4 Lines	1,587,521,285	222,191,662	122,357,497	1,487,687,120	214,412,228	3,744,351	210,667,877	14.16
				1943				
A. C. L. RR.	295,397,411	42,127,812	35,091,516	288,361,115	58,257,222	208,341	58,048,881	20.13
L. & N. RR.	472,561,455	113,143,876	52,913,268	412,330,847	81,749,976	301,691	81,488,285	19.76
S. A. L. Rwy.	284,170,710	38,619,353	26,273,512	271,824,869	44,704,000	580,925	44,123,075	16.23
Southern Rwy.	553,893,127	56,703,300	39,401,738	536,591,565	92,367,688	2,996,100	89,371,588	16.66
Total—4 Lines	1,606,022,703	250,594,341	153,680,034	1,509,108,396	277,118,886	4,087,057	273,031,829	18.09

Source: Annual Reports of the four carriers to the Interstate Commerce Commission.
Columns (1) and (3) Schedule 200A.
Column (2) Schedule 200L.
Column (5) Schedules 300I and 350.
Column (6) Schedule 300I.

Computations:
Column 4—The difference—Column (1) minus Column (2) added to Column (3)
Column 7—Column (5) minus Column (6).
Column 8—Percentage ratio, Column (7) to Column (4).

Raleigh, N. C.
June, 1944.

[fol. 1069] OFFER IN EVIDENCE

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of January, A. D. 1942

Ex Parte No. 148

Increased Railway Rates, Fares, and Charges, 1942

ORDER.

It appearing, That, by petition dated December 13, 1941, as amended, the petitioning class I railway companies of the United States, by petition dated December 22, 1941, as amended, the petitioning class II and class III railway companies of the United States, and certain other railway companies therein mentioned, and by petition dated December 16, 1941, certain common carriers by water engaged in the transportation of passengers, seek authority to increase by 10 percent their freight rates and charges, with certain exceptions not necessary to describe herein, and their passenger fares, except fares specially published for application to members of the military or naval forces of the United States traveling on furlough, and fares published as extra fares, applicable in connection with transportation on particular trains; and that the proper authorities of all States have been notified of this proceeding, and similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;

It further appearing, That said petitions have been heard, the proceeding has been submitted, and investigation of the matters and things involved has been made; and that in the hearing and investigation of these matters the Commission has had the cooperation and advice of a committee duly appointed for the purpose and consisting of members of the State regulatory authorities;

It further appearing, That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) ad-

ditional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;

And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful;

It is ordered, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, provided that where the total increased fares are less than $1 fractions of less than one-half cent shall be dropped and fractions of one-half cent or greater may [fol. 1070] be increased to the next whole cent, and that where the total increased fares are more than $1 such fares shall end in 0 or 5, but no more than 2.5 cents shall be added to the present fares as increased by 10 percent in order to make such total fares end in 0 or 5.

It is further ordered, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 29, 1936, in docket No. 26550, *Passenger Fares and Surcharges.*

It is further ordered, That all tariffs or supplements changing fares by authority of this order, which are maintained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order.

It is further ordered, That the increased fares herein authorized may be made effective upon not less than 10

days' notice to the Commission and to the general public by publishing, filing, and posting in the manner provided in section 6 of the Interstate Commerce Act; and that a copy of this order be served on each of said petitioners and on the Governors of the several States.

And it is further ordered, That jurisdiction be, and it is hereby, retained by the Commission, for the purpose of determining, if need be, the lawfulness of any particular fare or fares, resulting from this order.

The Commission not yet having determined the remaining issues involved, namely, those relating to the rates and charges for the transportation of freight, and services connected therewith, and for the transportation of milk and cream, jurisdiction is hereby retained for the purpose of further consideration and determination of such other issues herein.

[fol. 1071] Fourth Section Order No. 14500

It appearing, That the Commission by its order this day entered in this proceeding, which is hereby referred to and made a part hereof, has approved certain proposed increased fares for the transportation of passengers over the lines of carriers in the United States;

It further appearing, That representations have been made by the applicant carriers in this proceeding that increased fares cannot be published and made effective in the manner authorized therein without producing in some instances charges in contravention of the long-and-short-haul and aggregate-of-intermediates provisions of section 4 of the Interstate Commerce Act; that said carriers have applied for such fourth-section relief as may be necessary to publish and make effective the said proposed increased fares authorized by the said order without relief from the provisions of section 4, and that a special case exists within the meaning of said section:

It is ordered, That carriers subject to the Interstate Commerce Act be, and they are hereby, authorized to establish the increased fares so approved without observing the provisions of section 4 of the act, provided, that (1) the authority contained herein to maintain fares in contravention of the aggregate-of-intermediates provision of section 4

shall expire six months from the establishment of such fares; and (2) where fares established under the authority contained herein are increased by greater amounts to or from intermediate points than to or from more distant points, or where increases are made in fares to or from intermediate points and not to or from more distant points, thereby creating or increasing departures from the long-and-short-haul provision of section 4, the relief herein shall expire three months from the establishment of such fares; provided, that if applications are filed within the said three months' period for relief to continue any of such fares beyond that period, in the manner and form provided in rule XVIII of the Rules of Practice of the Commission, the fares included in and covered by such respective applications may be continued until the determination thereof by the Commission.

It is further ordered, That in instances in which fares in contravention of the provisions of section 4 are established under the authority contained herein, the schedule or schedules containing such fares shall make reference to this order in the manner required by rule 28 of Tariff Circular 20.

By the Commission. W. P. Bartel, Secretary. (Seal.)

[fols. 1072-1073] OFFER IN EVIDENCE

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of August, A. D. 1942.

Ex Parte No. 148

Increased Railway Rates, Fares, and Charges, 1942

No. 26550

Passenger Fares and Surcharges

ORDER

It appearing, That in No. 26550, *Passenger Fares and Surcharges*, 214 I. C. C. 174, the Commission found, among other things that the regular passenger-fare structure of the railroads of the country, including those in southern passenger association territory, with certain exceptions not here important, would for the future be unreasonable to the extent that it might exceed 2 cents per passenger-

mile in coaches, without prejudice to the maintenance of lower fares in any one or more of the major districts of the country; that by order of January 21, 1942, in Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the Commission approved as reasonable an increase of 10 percent in the passenger fares then in effect; and that such increased fares became effective February 10, 1942;

It further appearing, That on July 14, 1942, the railroads operating in southern passenger association territory filed a petition in No. 26550, to which no reply or protest has been received, seeking a modification of our findings and outstanding orders therein to the extent necessary to enable such petitioners to publish and file tariffs increasing their basic coach fare from 1.65 cents (1.5 cents plus 10 percent) to 2.2 cents (2 cents plus 10 percent) per mile;

And it further appearing, That a basic coach fare of 2 cents per mile was approved by the Commission for application prior to Ex Parte No. 148 on railroads generally throughout the country, including the lines of said petitioners; that a general increase of 10 percent was authorized to be made in all passenger fares in Ex Parte No. 148, for the reasons set forth in the report therein, *supra;* and that a basic coach fare of 2.2 cents per mile is now maintained on Class I railroads generally throughout the country, with the exception of the aforesaid petitioners:

It is ordered, That the said petition in No. 26550 be, and it is hereby, denied.

It is further ordered, That the order of January 21, 1942, in Ex Parte No. 148 be, and it is hereby, further modified so as to authorize the aforesaid petitioners to apply the increase of 10 percent approved in said order to a basic coach fare of 2 cents per mile on the lines of said petitioners, subject to the rule for the disposition of fractions as modified by order of July 6, 1942, in said proceeding, and that in all other respects said order of January 21, 1942, shall remain in full force and effect.

By the Commission. W. P. Bartel, Secretary. (Seal.)

A true copy: W. P. Bartel, Secretary of the Interstate Commerce Commission.

[fol. 1074] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. S. TASSIN—Filed July 12, 1944

District of Columbia:

Personally appeared before me, a Notary Public in and for the District of Columbia, J. S. Tassin, who being first duly sworn in the above-entitled cause, says:

That for the last twelve years he has been employed as General Statistician by Southern Railway System lines; that he has had more than forty years experience in statistical and accounting work; and as part of the duties of his employment he is required to and does study the current statistics of operations and income and the like of common carrier railroads as reported by the carriers (as required by law) to the Interstate Commerce Commission and the North Carolina Utilities Commission;

And that he is familiar with the record in the proceeding before the Interstate Commerce Commission identified as Docket No. 29036, and the statistical computations presented therein, having himself testified in said proceeding;

[fol. 1075] And that he has read and studied the affidavit of Frank A. Downing attached as an appendix, #156.1, to petition of State of North Carolina and North Carolina Utilities Commission to enjoin and set aside an order of the Interstate Commerce Commission issued in its Docket 29036.

Affiant says that the computations therein made of the expense per passenger mile in coaches of 1.75 cents for the year 1937 and 0.98 of one cent for the year 1942 and 0.81 of one cent for the year 1943 are as computed on pages 50 and 51 of brief of the North Carolina Utilities Commission, dated February 16, 1944 (#112 to petition);

And that the method of such computation was to multiply the revenue per *coach mile* by the ratio of passenger expenses to revenues and divide that result by the passenger miles per coach mile;

Affiant says that such method is improper and does not result in ascertainment of a reasonably approximate cost per coach passenger mile for the reason that the revenues used as a divisor in obtaining an expense ratio reflect not

only those received from coach but likewise revenues from parlor car and sleeping car passengers and, in addition, mail, express, and all other revenues required by the Interstate Commerce Commission to be classified under the general head of passenger;

[fol. 1076] And that expenses used as a dividend in arriving at said passenger operating ratios similarly reflect, under rules promulgated by the Interstate Commerce Commission, and undivided aggregate pertinent to all such services;

And that, were it undertaken, by adequate and proper cost finding procedure, to segregate the expenses according to the services, it would be found that each service would reflect its own particular and peculiar ratio which ratios would be at variance with the general ratio utilized by Mr. Downing. The general ratio he used assumes a uniform relation of expenses to revenues for the several services, which is contrary to the facts.

Affiant says that the Louisville and Nashville Railroad Company (having but 13 miles in North Carolina), relatively speaking, is not an important carrier in the State of North Carolina;

And that, still relatively speaking, Southern Railway Company is more representative of conditions in North Carolina than either Atlantic Coast Line Railroad Company or Seaboard Air Line Railway Company;

And that, for purpose of general comparisons pertinent to Class I railroads of Southern region serving the State of North Carolina, aggregate for such railroads will be found fairly representative and proper to be used in the interest of conservation and economy of effort;

[fol. 1077] And that, from the standpoint of rate, fare, and charge regulation, results for particular years are not significant. Instead a showing over a representative period of years must be relied upon. For example, from 1926 to 1932, both inclusive, reflecting a decreasing volume of revenues such as obtained in the South generally, on the one hand, and from 1933-1943, both inclusive, reflecting an increasing volume of revenue such as obtained in the South generally;

Affiant says that Mr. Downing has submitted in his affidavit computations based on data from four North Carolina lines. These results are subject to the inherent infir-

mities hereinabove set out in respect of the computations based on the data of six North Carolina lines and discussed in the brief (#112) of the North Carolina Utilities Commission. Briefly summarized, he applies the general passenger ratio against the result obtained by dividing aggregate coach revenues by aggregate coach miles. Hence, his result of 0.97 cent for 1942 and 0.91 cent for 1943 are erroneous because they reflect operating revenues and expenses other than those applicable to coach passengers, to wit, revenues and expenses incident to sleeping and parlor car travel, as well as to mail, express, milk, baggage, etc., all of which under the Interstate Commerce Commission's classification of accounts are included under the head of passenger;

[fol. 1078] Affiant calls atttention to the erroneous rates of return shown by Mr. Downing at page 3 of his affidavit and particularly in the appendix. In deducting Federal taxes before determining a net railway operating income, he has deducted excess profits taxes and all Federal income taxes. Clearly so broad and all-inclusive a deduction is not justified under any approach to this question. Be that as it may, the North Carolina rail lines' contribution to the Federal government necessarily comes out of their operations and must be paid out of revenue derived from their railroad operation. Money that must be paid must be earned or received from some source. The theory of deducting a tax in advance of determining the result of operation is necessarily fallacious. In a word, one's taxes, like any other expense of doing business, must first be paid before the results of a year's operation can be determined.

Affiant says that the net railway operating income figures shown by Mr. Downing on page 3 of his affidavit for the four months, December 1943 through March 1944, standing alone are misleading. The only fair comparison would be to compare those four months with the same months for the preceding year. Affiant therefore restates Mr. Downing's figures with the comparison for the same months in the previous year in the right-hand column.

[fol. 1079]

Month	Net Railway Operating Income	Same Month Previous Year
December 1943	$11,035,492	$28,578.717
January 1944	14,411,720	18,231,591
February 1944	15,555,855	18,566,603
March 1944	15,664,330	21,457,850

The foregoing comparison obviously shows a decreasing net railway operating income at a very substantial rate. The comparison of net railway operating income of lines in the Southern region which affiant has just made December 1943 versus December 1942, was used by the Interstate Commerce Commission in its report in Docket 29036. Exhibit 1 to the petition (258 I.C.C., at pages 140-141);

Intrastate traffic gets a great deal more benefit from interstate traffic than interstate traffic gets from intrastate traffic as affiant showed in Docket 29036 (R. 127-128). Specifically applying that to the revenues from passenger service of the Southern Railway Company applicable to the State of North Carolina shows the following results as annually reported to the Utilities Commission of the State of North Carolina:

Passenger Revenues Earned in North Carolina

Year	Intrastate	Interstate	Total
1939	$ 160,564	$ 870,631	$ 1,031,195
1940	370,533	1,455,803	1,826,336
1941	453,054	2,405,761	2,858,815
1942	908,878	5,944,583	6,853,461
1943	1,446,447	8,887,319	10,333,766

[fols. 1080-1081] Affiant says that the figures shown above for interstate cover passenger traffic from a sister state to a sister state passing entirely through North Carolina; also passenger traffic originating in North Carolina and terminating in a sister state and passenger traffic originating in a sister state and terminating in North Carolina—all of which is interstate commerce.

Affiant further says that he is authorized to make this affidavit and does so for use in the aboye-entitled cause.

J. S. Tassin.

Sworn to and subscribed before me this thirtieth day of June, 1944. P. K. Howard, Notary Public. My Commission expires May 1, 1945. (Seal.)

[fol. 1082] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF L. L. OLIVER—Filed July 12, 1944

Personally appeared before the undersigned notary public, duly authorized to administer oaths in the District aforesaid, L. L. Oliver, who being duly sworn in the above-entitled cause, says upon oath:

That he is an attorney for the Southern Railway Company and, as such, was leading counsel in the proceeding before the North Carolina Utilities Commission identified by its Docket No. 2789.

That on April 26, 1944, Chairman Winborne of said North Carolina Commission wrote him a letter, copy of which is attached hereto as Exhibit A. With that letter were four enclosures, copies of which are attached and identified as follows:

Letter dated April 8, 1944, from Mr. Nicholson to Mr. Reveille, General Auditor, Norfolk Southern Railway Company, marked Exhibit B;
Letter dated April 8, 1944, from Mr.. Nicholson to Mr. Hewitt, General Auditor, Clinchfield Railroad Company, marked Exhibit C; and
Further letters from Mr. Nicholson to said addressees, both dated April 19, 1944, marked Exhibits D and E.

Affiant attaches hereto as Exhibit F, copy of his letter to Chairman Winborne, dated April 28, 1944.

Affiant observed the second paragraph of the reply of the North Carolina Utilities Commission to the motion of re-
[fol. 1083] spondents in Docket No. 29036 for the entry of an order therein, wherein said Commission referred to its request for further statistical data which had not been received (exhibit identified as No. 117 to petition in this cause). Thereupon affiant investigated with the accounting officers of the Southern Railway Company and wrote Chairman Winborne on May 11, 1944, as per copy attached, identified as Exhibit G.

As a result of affiant's investigation with his Accounting Department, six letters were brought to his attention which

are submitted herewith, identified by date and exhibit letter as follows:

March 8, 1944, Nicholson to Luckett, Exhibit H,
March 31, 1944, Nicholson to Luckett, Exhibit I,
April 3, 1944, Luckett to Nicholson, Exhibit J,
April 8, 1944, Nicholson to Luckett, Exhibit K,
April 12, 1944, Luckett to Nicholson, Exhibit L,
April 29, 1944, Luckett to Nicholson, Exhibit M.

To his letter of May 11, 1944, affiant received a reply from Chairman Winborne, dated May 17, 1944, copy attached hereto as Exhibit N.

In Mr. Winborne's letter (Exhbit N), reference was made to correspondence with Auditor Wimmer of the Seaboard Air Line Railway. Thereupon affiant investigated and, as a result thereof, submits herewith copies of four letters identified by date and exhibit letter as follows:

April 8, 1944, Nicholson to Wimmer, Exhibit O,
April 15, 1944, Wimmer to Nicholson, Exhibit P,
April 20, 1944, Nicholson to Wimmer, Exhibit Q,
May 1, 1944, Wimmer to Nicholson, Exhibit R.

Affiant further says that he is advised by said Wimmer that he has never received any reply from Mr. Nicholson to his (Wimmer's) letter of May 1, 1944 Exhibit R).

[fol. 1084] Affiant says that he is authorized to make this affidavit and makes the same for use in the above-stated cause.

L. L. Oliver.

Sworn to and subscribed before me this thirtieth day of June, 1944. P. K. Howard, Notary Public. (Seal.)

My commission expires on May 1, 1945.

[fol. 1085] EXHIBIT "A"

North Carolina Utilities Commission

Raleigh

April 26, 1944

Mr. I. L. Oliver, Attorney, Southern Railway Building, Washington 13, D. C.

N.C.U.C. Docket No. 2789

DEAR SIR:

This will refer to yours of April 19, 1944, jointly with Messrs. Gwathmey and Clark, with respect to the interstate Commerce Commission's report in I.C.C. Docket No. 29036. In the meantime a copy of our petition for an extension of time, reconsideration, etc., has been served upon you.

The Interstate Commerce Commission's report in its Docket No. 29036, as well as the North Carolina Commission's report in Docket No. 2789, refers to the deficits from passenger operations in 1942 by the Clinchfield Railroad Company and Norfolk Southern Railway Company. In order to supplement the record in Docket No. 2789, we have requested the information specified in copies of letters attached, from the accounting officers of the two respective carriers. As of this date the information requested has not been received. Since you were counsel in chief for the North Carolina petitioners at the hearing here in Docket No. 2789, it occurs to us that the information requested should be filed by you and that a copy thereof should at the same time be served upon all parties of record.

Anticipating your usual prompt response to a request of this kind, I am

Very truly yours, (Signed) Stanley Winborne, Chairman.

Copy: All parties of record in Docket No. 2789.

[fol. 1086] EXHIBIT "B"

NORTH CAROLINA UTILITIES COMMISSION

Raleigh, April 8, 1944.

Mr. G. C. Reveille, General Auditor, Norfolk Southern Railway Company, Norfolk 10, Va.

DEAR SIR:

The Commission is desirous of obtaining the following comparative data relative to the operation of your entire road for the calendar years 1942 and 1943, separately, in advance of the filing of your 1943 Annual Report:

1. Rate of return on investment for your property as a whole—as reported to the Interstate Commerce Commission.

2. Operating ratio.

3. Freight operating ratio.

4. Passenger operating ratio.

You are requested to furnish these figures to the Commission at your very earliest convenience.

Yours very truly, H. M. Nicholson, Director of Traffic.

FAD:MKB.

[fol. 1087] EXHIBIT "C"

North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. Chas. Hewett, General Auditor, Clinchfield Railroad Company, Erwin, Tenn.

DEAR SIR:

The Commission is desirous of obtaining the following comparative data relative to the operation of your entire road for the calendar years 1942 and 1943, separately, in advance of the filing of your 1943 Annual Report:

1. Rate of return on investment for your property as a whole—as reported to the Interstate Commerce Commission.

2. Operating ratio.

3. Freight Operating ratio.

4. Passenger operating ratio.

You are requested to furnish these figures to the Commision at your very earliest convenience.

Yours very truly, H. M. Nicholson, Director of Traffic.

FAD:MKB.

[fol. 1088] EXHIBIT "D"

NORTH CAROLINA UTILITIES COMMISSION

Raleigh, April 19, 1944.

Mr. G. C. Reveille, General Auditor, Norfolk Southern Railway Company, Norfolk 10, Virginia.

DEAR SIR:

Your are requested to furnish the following figures resulting from your lines entire system operation for the calendar years 1942 and 1943.

1. Net railway operating income.

2. Net railway operating income or deficit from passenger operations.

Thanking you in advance for your prompt consideration.

Yours very truly, H. M. Nicholson, Director of Traffic.

HMN:Bh.

[fol. 1089] EXHIBIT "E"

North Carolina Utilities Commission

Raleigh, April 19, 1944.

Mr. Charles Hewett, General Auditor, Clinchfield Railroad Company, Erwin, Tenn.

DEAR SIR:

You are requested to furnish the following figures resulting from your lines entire system operation for the calendar years 1942 and 1943.

1. Net railway operating income.

2. Net railway operating income or deficit from passenger operations.

Thanking you in advance for your prompt consideration.

Yours very truly, H. M. Nicholson, Director of Traffic.

HMN:bh.

[fol. 1090] EXHIBIT "F"

April 28, 1944-f.

North Carolina Intrastate Passenger Fares

Mr. Stanley Winborne, Chairman; North Carolina Utilities Commission, Raleigh, North Carolina.

DEAR MR. WINBORNE:

I have your letter of April 26 in connection with the above matter and have also received copy of the petition of the North Carolina Utilities Commission to the Interstate Commerce Commission seeking rehearing, reargument, and reconsideration in I. C. C. Docket No. 29036.

Your request for certain statistical data covering the operations of the Clinchfield Railroad Company and the Norfolk Southern Railway Company has been transmitted to counsel for those companies and I feel certain you will hear from them direct.

Yours very truly, (Signed) L. L. Oliver, Commerce Counsel.

[fol. 1091] EXHIBIT "G"

SOUTHERN RAILWAY SYSTEM, LAW DEPARTMENT

Washington, D. C. (13), May 11, 1944-f.

Intrastate Passenger Fares in North Carolina,
I. C. C. Docket No. 29036

Mr. Stanley Winborne, Chairman; North Carolina Utilities Commission, Raleigh, North Carolina.

DEAR MR. WINBORNE:

On April 26 you wrote me stating that in order to supplement the record in N. C. U. C. Docket No. 2789, your Commission had requested of the Clinchfield Railroad Company and Norfolk Southern Railway Company the information specified in copies of letters which you attached, that the information had not been received, and that inasmuch as I had appeared as counsel in chief for the North Carolina petitioners it occurred to you that the information requested should be filed by me. I acknowledged your letter on April 28th, advising that I had transmitted your request for the statistical data to counsel for the Clinchfield Railroad Company and the Norfolk Southern Railway Company and that doubtless you would hear from them direct. Subsequently, I was advised by counsel for these lines that the desired information had been sent to Mr. H. M. Nicholson, Director of Traffic, by the Norfolk Southern on May 1st, and by the Clinchfield on May 2nd.

Your letter did not indicate that any request for statistical data had been made upon any of the North Carolina lines other than the two which were mentioned in your letter, and in view of this, I was very much surprised at the statement made in the second paragraph of the reply of the North Carolina Utilities Commission to the respondents' motion for entry of a thirteenth-section order in I. C. C. Docket No. 29036 to the effect that your Commission had requested the railroads to furnish certain additional statistical data in order that it might give consideration to the matter of adjusting fares in relation to the findings of the Interstate Commerce Commission, and that the railroads failed or declined to furnish such statistical information.

[fol. 1092] Upon receipt of the document in which this statement was made, I checked with the accounting officers of Southern Railway Company to ascertain whether requests similar to those made upon the accounting officers of the Norfolk Southern and the Clinchfield had been made upon them. I found that Mr. Nicholson had made request for data relative to the operation of what he termed our "deluxe, reserved seat passenger service" during the calendar year 1943, specifically, the passenger revenue, passenger car miles, and passenger miles, and that he had also made a separate request for a statement showing the total railway passenger operating revenues and expenses assigned and apportioned to passenger and allied services for the entire system during the calendar year 1943. In response to the request first referred to, Mr. Nicholson was advised by our General Auditor that due to the increase in passenger traffic and the substantial reduction in our trained personnel it had been necessary to discontinue the compilation of statistics showing passenger revenue, passenger car miles, and passenger miles by individual trains and that for this reason the information requested had not been compiled and could not be furnished. In response to the request for a statement showing the total railway operating revenues and expenses, assigned and apportioned to passenger and allied services for the year 1943, the information sought was forwarded by our General Auditor to Mr. Nicholson on April 29th.

The requests made upon the Clinchfield Railroad Company, the Norfolk Southern Railway Company, and Southern Railway Company are the only requests made by your Commission for statistical data as to passenger operations of which I have any knowledge, and, as above indicated, these requests were complied with as fully and as speedily as possible. I am, therefore, at a loss to understand the allegation made in the second paragraph of the reply of your Commission to respondents' motion for entry of the thirteenth-section order in I. C. C. Docket No. 29036, and I shall appreciate it if you will advise just what information it is that the railroads have failed or declined to furnish at your request.

I am sure that you know there is no disposition on the part of counsel in these proceedings or on the part of the accounting officers of any of the North Carolina lines to with-

hold any information that would be helpful to your Commission in this or any other matter.

Yours very truly, (Signed) L. L. Oliver, Commerce Counsel.

Copies to: Mr. W. P. Bartel, Secretary Interstate Commerce Comm., Wash., D. C. and all parties of record.

[fol. 1093] EXHIBIT "H"

North Carolina Utilities Commission

Raleigh, March 8, 1944

Mr. W. H. Luckett, General Auditor,
Southern Railway,
Washington, D. C.

DEAR SIR:

You are requested to advise this Commission at the earliest practicable date the total railway operating revenues and expenses, assigned and apportioned to passenger and allied services for the entire system of your line during the calendar year 1943.

Yours very truly, Signed, H. M. Nicholson, Director of Traffic.

FAD:MKB

[fol. 1094] EXHIBIT "I"

North Carolina Utilities Commission

Raleigh, March 31, 1944

Mr. W. H. Luckett, General Auditor,
Southern Railway,
Washington D. C.

DEAR SIR:

On March 8, 1944, we wrote you as follows:

"You are requested to advise this Commission at the earliest practicable date the total railway operating reve-

nues and expenses, assigned and apportioned to passenger and allied services for the entire system of your line during the calendar year 1943."

We have had no reply to this request. May we have an answer immediately?

Yours very truly, Signed, H. H. Nicholson, Director of traffic.

FAD:MKB

[fol. 1095] EXHIBIT "J"

April 3, 1944.
File 5/27

Mr. H. M. Nicholson,
Director of Traffic,
North Carolina Utilities Commission,
Raleigh, N. C.

DEAR SIR:

I have your letter of March 31st, tracing for a response to yours of March 8th, asking to be advised the total railway operating revenues and expenses, assigned and apportioned to passenger and allied services, for the calendar year 1943.

For your information, it was necessary, because of the increased burden placed upon us account of war activity and the loss of specially trained personnel, to request from the Interstate Commerce Commission and all of the State Commissions an extension of time in which to file the various annual reports for the year 1943. Under date of March 21st, 1944, Miss Elsie G. Riddick, Assistant Chief Clerk of your Commission, advised that the Commission directed her to advise us that our request for an extension of time to April 30th to file our reports was granted, with the understanding that the reports will be filed as much in advance of that date as possible.

The preparation of our annual reports to the State of North Carolina is progressing nicely and I can assure you this information will be sent to you at the earliest possible date.

Yours very truly, Signed, W. H. Luckett, General Auditor.

[fol. 1096] EXHIBIT "K"

North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. W. H. Luckett,
General Auditor,
Southern Railway,
Washington 31, D. C.

DEAR SIR:

You are requested to furnish the Commission the following data relative to the operation of your *deluxe, reserved seat passenger service* during the calendar year 1943:

1. Passenger revenue
2. Passenger car miles
3. Passenger miles

A reply at your earliest convenience containing the requested information would be appreciated.

Yours very truly, Signed H. M. Nicholson, Director of Traffic.

FAD:MKD

[fol. 1097] EXHIBIT "L"

April 12, 1944.

Mr. H. M. Nicholson,
Director of Traffic,
North Carolina Utilities Commission,
Raleigh, N. C.

DEAR SIR:

Receipt is acknowledged of your letter of April 8th requesting that we furnish the Commission data relative to the operation of deluxe, reserved seat passenger service during the calendar year 1943:

1. Passenger revenue
2. Passenger car miles
3. Passenger miles

Due to the enormous increase in our passenger traffic and the substantial reductions in our trained personnel,

it became necessary for us to discontinue the compilation of statistics showing passenger revenue, passenger car miles, and passenger miles by individual trains, and for this reason I regret to advise that the information requested by you has not been compiled and it would be impossible for us to compile it at this date.

Very truly yours, Signed, W. H. Luckett, General Auditor.

[fol. 1098] EXHIBIT "M"

April 29, 1944.
File 5/27

Mr. H. M. Nicholson, Director of Traffic,
North Carolina Utilities Commission,
Raleigh, North Carolina.

DEAR SIR:

Referring further to your letter of March 31 and mine of April 3, in connection with your request to be advised the total railway operating revenues and expenses assigned and apportioned to passenger and allied services for the calendar year 1943:

This is to advise that we have today forwarded to Miss Elsie G. Riddick our 1943 Annual Reports to the Utilities Commission of the State of North Carolina. I assume you will have access to these reports, which contain the information you have requested. If however there is any additional data you require, please let me know.

Yours very truly, Signed W. H. Luckett, General Auditor.

[fol. 1099] EXHIBIT "N"

North Carolina Utilities Commission

Raleigh, May 17, 1944.

Mr. L. L. Oliver, Commerce Counsel,
Southern Railway System,
Washington 13, D. C.

Docket No. 29036, North Carolina Intrastate Coach Fares

DEAR MR. OLIVER:

This will reply to yours of May 11, 1944, calling attention to your reply of the North Carolina Commission to respondents' motion for entry of a thirteenth-section order in the above docket. You also refer to my letter of April 26, wherein certain information which had already been requested of accounting department officials was directed to your attention. At the time of receiving word from the press on May 12, 1944, that the Interstate Commerce Commission had entered an order in this proceeding, a letter to you had been drafted particularizing certain statistical information which had been requested of individual lines and which at that time has not been supplied, nor has it since been received. However, upon learning of the Interstate Commerce Commission's action with respect to entry of the order, the letter to you was held up. The type of information referred to is quite different from that specified in my letter of April 26, 1944.

With reference to the request for data pertaining to reserved seat coach service there is an uncompleted exchange of correspondence with C. C. Wimmer, Auditor, Seaboard Air Line Railway, however in light of the Interstate Commerce Commission's denial of our petition for an extension of time, etc., the matter of additional statistics is for the present in status quo.

No doubt the foregoing will satisfactorily explain the statement referred to, if not please so advise and copies of the several letters involved will be supplied.

Very truly yours, Signed, Stanley Winborne, Chairman.

SW:MKB

Copy to Mr. W. P. Bartel, Sec. Interstate Commerce Commission, Washington 25, D. C.
All parties of record.

[fol. 1100] EXHIBIT "O"

North Carolina Utilities Commission

Raleigh, April 8, 1944.

Mr. C. C. Wimmer, Auditor, Seaboard Air Line Railway, Portsmouth, Va.

DEAR SIR:

You are requested to furnish the Commission the following data relative to the operation of your *deluxe, reserved seat passenger service* during the calendar year 1943:

1. Passenger revenue
2. Passenger car miles
3. Passenger miles

A reply at your earliest convenience containing the requested information would be appreciated.

Yours very truly, H. M. Nicholson, Director of Traffic.

[fol. 1101] EXHIBIT "P"

Portsmouth, Va., April 15, 1944. s 3450-A

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, N. C.

DEAR SIR:

Referring to your letter of April 8th in which request is made for certain data with respect to the operations of our streamlined trains.

The trains to which you refer carry both coach and Pullman passengers and it is not clear whether the information you desire relates to both coach and Pullman service. I should also like to know whether the data requested is for intrastate or interstate travel.

If you will advise me more specifically as to just what information is desired and the purpose for which it is intended to be used, I will be glad to give your request further consideration. However, it is doubtful if the information requested is available as we are not required to currently compile and publish such statistics by trains.

Yours very truly, C. C. Wimmer, Auditor.

[fol. 1102] EXHIBIT "Q"

North Carolina Utilities Commission

Raleigh, April 20, 1944.

Mr. C. C. Wimmer, Auditor, Seaboard Air Line Railway, Portsmouth, Va.

DEAR SIR:

Yours April 15th, file 3450-A.

The revenue and statistical data requested in mine of April 8th related solely to *reserved seat coach* service for which coach fares are collected. Where reserved seat coaches are handled in trains with pullman cars or with non-reserved seat coaches, the figures are desired for traffic handled in the reserved seat coaches *only*.

The data requested is for your entire system operation during 1943 both intra and interstate.

Yours very truly, H. M. Nicholson, Director of Traffic.

[fols. 1103-1104] EXHIBIT "R"

Portsmouth, Va., May 1, 1944. 1 3450-A

Mr. H. M. Nicholson, Director of Traffic, North Carolina Utilities Commission, Raleigh, N. C.

DEAR SIR:

Referring to your letter of April 20th relating to data you desire with respect to reserved seat passenger coach service operated by the Seaboard.

Certain of the data which you requested can only be obtained during the time the tickets which are lifted on each train are held intact, and certain other data can be compiled at some additional expense and considerable time of our forces who are already heavily burdened, therefore, before proceeding further, will you please advise me for what purpose the information is requested, also advise if other railroads who operate competitive service in the territory served by the Seaboard will likewise supply data of the character which you have requested the Seaboard to furnish.

Yours very truly, (Signed) C. C. Wimmer, Auditor.

[fols. 1105-1106] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189 Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, Charlotte Shippers & Manufacturers Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, Plaintiffs,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

DECREE—Filed July 22, 1944

This cause coming on to be heard before the undersigned, constituting a special District Court of three judges convened pursuant to 28 U. S. C. A. 47, upon an application for an interlocutory injunction; and being heard upon the evidence taken before the Interstate Commerce Commission and the Report of the Commission, as well as upon the arguments and briefs of counsel; and the cause, by consent of the parties, having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the Court herewith filed, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed.

This the 20th day of July, 1944.

John J. Parker, United States Circuit Judge, Fourth Circuit. I. M. Meekins, United States District Judge, Eastern District of North Carolina. Johnson J. Hayes, United States District Judge, Middle District of North Carolina.

[fol. 1107] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed July 22, 1944

FINDINGS OF FACT

The Court makes the following findings of fact:

1. The Interstate Commerce Commission on March 25, 1944 filed its report and order, 258 I. C. C. 133, modified by order of May 8, 1944, requiring railroads serving the State of North Carolina to establish and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

2. The effect of the order is to require the present basic coach fare in North Carolina of 1.65 cents per mile to be increased to the present interstate level of 2.2 cents per mile.

3. The Commission found the interstate coach passenger coach fares prevailing in North Carolina to be just and reasonable and this finding is supported by substantial evidence.

4. The Commission found that the conditions affecting interstate and intrastate transportation in the State of North Carolina were substantially similar and that the disparity between interstate and intrastate coach fares constituted [fol. 1108] discrimination in favor of intrastate passengers and against interstate passengers using the same facilities; and these findings are supported by substantial evidence.

5. The Commission found that the revenues of rail carriers in North Carolina are less by $525,000.00 per annum than they would be if intrastate fares were increased to the interstate level and that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable the rail carriers to render adequate and efficient transportation service; and this finding is supported by substantial evidence.

6. The Commission found that the maintenance of the lower intrastate coach fares in North Carolina causes and will cause undue and unreasonable advantage to and prefer-

ence of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce; and that this unlawfulness should be removed by increasing intrastate fares to the level of interstate fares.

7. The Commission afforded full and fair hearing to plaintiffs and accorded to the Price Administrator full opportunity to be heard and present contentions under the Stabilization Act.

8. The Commission filed a report, 258 I. C. C. 133, setting forth its findings and analyzing the evidence in support thereof; and the basic findings as well as the ultimate findings therein contained are supported by substantial evidence.

Conclusions of Law

And the Court sets forth the following as its conclusions of law:

1. The findings and order of the Commission are based on substantial evidence, do not involve any error of law [fols. 1109-1110] and are not arbitrary or unreasonable.

2. The Commission properly required that railroads serving the State of North Carolina establish and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

3. Injunction should be denied and the suit should be dismissed.

John J. Parker, United States Circuit Judge, Fourth Circuit. I. M. Meekins, United States District Judge, Eastern District of North Carolina. Johnson J. Hayes, United States District Judge, Middle District of North Carolina.

[fol. 1111] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, Charlotte Shippers & Manufacturers Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, Plaintiffs,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

On Application for Injunction

Argued July 12, 1944.

Before Parker, Circuit Judge, and Meekins and Hayes, District Judges

J. C. B. Ehringhaus and F. C. Hillyer for State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., and North Carolina Division of the Travelers Protective Association of America; Richard H. Field, General Counsel, David F. Cavers, Assistant General Counsel, Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Division, and M. D. Miller, Attorney, Office of Price Administration, for Price Administrator; Charles Clark, General Attorney Southern Railway System, Frank W. Gwathmey and Joseph P. Cook for North Carolina Rail Lines; Leon Jourolmon, Jr., for Railroad & Public Utilities Commission of the State of Tennessee; —— for Alabama Public Service Commission; and —— for Commonwealth of Kentucky. Edward Dumbauld, Special Assistant to the Attorney General, Wendell Berge, Assistant Attorney General, J. O. Carr, United States Attorney, Daniel J. Knowlton, Chief Counsel and J. Stanley Payne, Assistant Chief Counsel Interstate Commerce Commission, for United States and Interstate Commerce Commission.

OPINION—Filed July 22, 1944

[fol. 1112] PARKER, Circuit Judge:

This is a suit under the Urgent Deficiencies Act (28 U. S. C. A. 43-48) to enjoin and set aside an order of the Interstate Commerce Commission requiring railroads serving the State of North Carolina to establish and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares. The effect of the order is to require the present basic coach fare in North Carolina of 1.65 cents per mile to be increased to the present interstate level of 2.2 cents per mile. A special court of three judges has been convened pursuant to statute, intervention has been allowed on the part of various interested parties, and the case has been heard on the merits and submitted for final decree.

The findings of the Commission in support of the order, made in a proceeding relating to fares in the States of Alabama, Kentucky and Tennessee, as well as in North Carolina (Alabama Intrastate Fares 258 I. C. C. 133, 154-155), are as follows:

"1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

"2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

"3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and inter-

state to, from, and through those respective States on the other, are substantially similar.

"4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

[fol. 1113] "5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service.

"6. The maintenance of intrastate one-way and round trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State."

These ultimate findings of the Commission are supported by a detailed discussion of the evidence before it, which need not be repeated here, and by a review of the history of passenger rates since 1908, which because of its importance with relation to the fundamental questions here involved we quote as follows:

"In southern passenger association territory, hereinafter referred to as southern territory, which, generally speaking, is that territory east of the Mississippi River and south of the Ohio and Potomac Rivers, the basis of one-way fares from April 1, 1908, to June 9, 1918, was generally 2.5 cents per mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, the fare was increased to 3 cents per mile in all classes of equipment. This fare remained in effect until August 25, 1920, but during the period June 10 to November 30, 1918, an additional charge of 16 2/3 percent of the one-way fare was assessed for travel in sleeping and parlor cars. From August 26, 1920, to November 30, 1933, the fare generally was 3.6 cents per mile in all clases of equipment, plus a surcharge on transportation in sleeping and parlor cars on and after December 1, 1918, of 50 percent of the charge made for space occupied in such cars.

"During 1932 and 1933, certain of the carriers operating in Southern territory experimented with fares lower than 3.6 cents in attempts to attract additional passenger business in competition with transportation by private automobiles and in busses. For example, from April 1 to November 30, 1933, experimental one-way fares of 3 cents per mile in sleeping or parlor cars, without a surcharge, and 2 cents per mile in coaches, were maintained by the Atlanta and West Point Rail- [fol. 1114] road Company, The Western Railway of Alabama, Mobile and Ohio Railroad Company (now part of the Gulf, Mobile and Ohio Railroad Company), Louisville and Nashville Railroad Company, and The Nashville, Chattanooga & St. Louis Railway. During the same period the Southern Railway system lines were experimenting with coach fares of 1.5 cents per mile on certain portions of their lines.

"On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per

mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5-cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and the St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees.)

"In Passenger Fares and Surcharges, 214 I.C.C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or pullman cars. The pullman surcharge was found unreasonable and its cancellation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful.

"On November 15, 1937, the carriers which had been maintaining the experimental coach fare of 1.5 cents increased that fare to 2 cents per mile, but restored the 1.5-cent fare on January 15, 1939. Again, certain of the southern lines, including the Illinois Central, Mobile & Ohio, St. Louis-San Francisco, and Norfolk and Western Railway Company, retained the 2-cent fare basis.

"By order of January 21, 1942, in Ex Parte No. 148, we found that a nation-wide increase of 10 percent in fares proposed by the railroads was necessary to enable the petitioners to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise lawful. See Increased Railway Rates, Fares, and Charges, 1942, 248 I.C.C. 545, 565, 566, where the foregoing findings were renewed and affirmed.

"The reestablished coach fares of 1.5 cents remained in effect until February 10, 1942, on which date the 10

percent increase in fares for transportation in both coaches and pullman cars became effective. On that date fares of 1.5 cents became 1.65 cents; fares of 2 cents became 2.2 cents; and fares of 3 cents became 3.3 cents. The round-trip fares were modified to reflect the increase in the one-way fares. On various subsequent dates these increased fares also became effective on intrastate traffic in all of the States.

"On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. Having found in Passenger Fares and Surcharges, supra, that 2 cents per mile was a reasonable basic coach fare [fol. 1115] for application on railroads generally throughout the country, including the lines of petitioners, we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority, one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic. Effective on the same date the railroads generally throughout southern territory, published a uniform basis of interstate round-trip fares to displace the round-trip fares theretofore in effect, namely, in coaches on the basis of 180 percent of the one-way fare of 2.2 cents, or 1.98 cents a mile, with a return limit of 3 months; and in sleeping and parlor cars on the basis of 166 2/3 percent of the one-way fare of 3.3 cents in such cars, or 2.75 cents a mile, with a return limit of 3 months. The increased fares proposed for application in southern territory were protested and suspension of their operations was requested by the Price Administrator, but we declined to suspend. The fares so increased are now in effect on interstate traffic.

"Thereafter, with the approval of the rate-regulatory authorities of those States, the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars were increased to the respec-

tive levels of the corresponding interstate fares in Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina, and the round-trip fares in sleeping and parlor cars were increased to the level of the interstate fares in such cars in North Carolina and Kentucky. The rate regulatory authorities of Alabama, North Carolina, Tennessee, and Kentucky have declined to authorize the increases sought by the railroads in one-way and round-trip coach fares in those states, and the rate regulatory authorities of Alabama and Tennessee have also refused to authorize the increases in the round-trip fares in sleeping and parlor cars. It is those fares in the four States last named which are here under investigation."

With respect to the reasonableness of the basic interstate coach fare of 2.2 cents, the Commission pointed out that from 1936 to the date of its order the five principal carriers operating in the State of North Carolina had shown a deficit from passenger operations for every year except the war year 1942. Referring to an application by the North Carolina Utilities Commission for a further investigation as to the reasonableness of interstate fares, after the entry of its order raising the interstate fares in southern territory to the level prevailing elsewhere, the Commission said:

"The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than the maximum basic fares found reasonable in Passenger Fares and Surcharges, supra, plus the 10 percent increase authorized in Ex Parte No. 148. These one-way [fol. 1116] fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents."

With respect to discrimination against interstate passengers, the Commission said: "All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same." And in replying to a contention that the intrastate coach service in North Carolina has deteriorated and is inferior to that provided for interstate traffic, the Commission said: "Admittedly, interstate as well as intrastate passengers may and do travel on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers."

With respect to the discrimination caused by these lower intrastate fares against the interstate commerce of the carriers, in that under the intrastate rates the intrastate passenger service was not contributing its fare share of the revenues required to maintain an adequate and efficient transportation service, the Commission said:

> "On the basis of audits made for representative periods by the principal respondents in each of these proceedings, the estimated amount of additional revenue which the respondents in the respective States would have received during those periods if the assailed intrastate fares had been on the interstate level, projected over the period of a year, exceeds $750,000 per annum in Alabama, $526,000 in Kentucky, $558,000 in North Carolina, and $556,000 in Tennessee."

Although many matters have been referred to in the pleadings and arguments, the case before us resolves itself into four questions: (1) Did the Commission have power to [fol. 1117] require that intrastate fares be raised to the level of reasonable interstate fares so as to eliminate discrimination against passengers in intrastate commerce and discrimination against the interstate business of the carriers? (2) Did the Commission's finding that the interstate fares were reasonable have adequate support in the record? (3) Did the Commission's findings as to discrimination against interstate passengers and the interstate commerce of the carriers have adequate support in the record? and (4) Was adequate consideration given by the Commis-

sion to the requirements of the National Stabilization Act? We think that all of these questions must be answered in the affirmative and shall discuss them in the order named.

The Power of the Commission

Paragraph (3) of section 13 of the Interstate Commerce Act as amended, 49 USCA 13(3), clothes the Commission with power, in any proceeding instituted under the Transportation Act, investigate any rate, fare, etc. made or imposed by the authority of any state. Paragraph (4) of that section authorizes the Commission to prescribe rates, fares, etc. to remove undue, unreasonable or unjust discriminations found to exist against persons and localities or against interstate or foreign commerce as a result of intrastate rates or fares. That paragraph is as follows:

> "Sec. 13, par. (4) Duty of Commission where State regulations result in discrimination. Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

[fol. 1118] Under this provision, it is the duty of the Commission not merely to remove discriminations against persons and localities but to remove unjust discrimination against interstate commerce resulting from unreasonable intrastate rates. Under 15a(2) of the Interstate Commerce

Act, 49 U. S. C. A. 15a(2), it is the duty of the Commission, in prescribing rates, to give due consideration to the effect thereof on the movement of traffic and on the principal objective of the act, which is to provide for the country an adequate and efficient railway transportation service. The power granted by 13(4) is to be construed along with the duty imposed by 15a(2). As said by Chief Justice Taft in Wisconsin R. R. Com'n v. Chicago, Burlington & Quincy Railroad Co., 257 U. S. 563, 585-586:

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, sec. 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of sec. 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimi-

nation against interstate or foreign commerce,' within the ordinary meaning of those words."

To the same effect is what is said by Chief Justice Hughes and Chief Justice Stone in the more recent cases of United [fol. 1119] States v. Louisiana 290 U. S. 70; Florida v. United States 292 U. S. 1; and Illinois Commerce Com'n v. United States 292 U. S. 474. In the case last cited Chief Justice Stone said:

"The scope and application of sec. 13(4) have so recently been fully considered in opinions of this Court in United States v. Louisiana, 290 U. S. 70; Florida v. United States, ante, p. 1; see also Georgia Public Service Comm. v. United States, 283 U. S. 765; Florida v. United States, 282 U. S. 194; that it is unnecessary to repeat that discussion here. Under sec. 13(4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service."

The philosophy underlying the granting of such power to the Commission was well put by Chief Justice Taft in the Wisconsin case, supra, as follows:

"* * * such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority

or a violation of the proviso [of the Interstate Commerce Act].

* * * * * * *

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant control of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. Wilson v. Shaw, 204 U. S. 24; Luxton v. North River Bridge Co., 153 U. S. 525; California v. Central Pacific R. R. Co., 127 U. S. 1, 39. In such development, it can impose any [fol. 1120] reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

In the light of these authorities, there is no force in the argument that the power exercised by the Commission was a violation of the rights of the states reserved by the 10th Amendment or in the suggestion that the duty rests upon this court to hear the case de novo for the purpose of ascertaining whether states rights have been violated. As was well said by Chief Justice Hughes in Florida v. United States, supra, 292 U. S. 1, 12:

"The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by sec. 13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to present other sorts of unjust discrimination against Interstate commerce. That authority rests upon the constitutional power of Con-

gress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. Shreveport Case, 234 U. S. 342, 351, 354, 355; Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. United States v. Louisville & Nashville R. Co., 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission."

The Reasonableness of the Interstate Fares

The Commission was fully aware that it had no power to order intrastate fares raised to the level of interstate fares without first finding that the interstate fares were reasonable. It so stated in its report, citing the decisions of the Supreme Court to that effect in Georgia Public [fol. 1121] Service Commission v. United States 283 U. S. 765, and United States v. Louisiana 290 U. S. 70. As a basis of its order, therefore, it made not only the general finding quoted above, but also the specific findings as to revenues from passenger business since 1936, which we have mentioned, referred to the increased costs of doing business and gave the history of passenger fares in the United States which we have quoted. In the light of all of these, we think there can be no question but that the finding of the reasonableness of interstate fares is adequately supported. It is perfectly clear that the reasonableness of such fares is not to be determined solely on the basis of transient war conditions, or upon the unusual passenger revenues due to such conditions, or upon a consideration of the passenger

business disassociated from the other business of the carriers. On the contrary, the Commission, in discharging its duty to fix just and reasonable rates and fares which will secure for the country an adequate and efficient transportation system, must view the system as a whole and must judge the future in the light of the past as well as of the present. The rate structure has had an historical development, which may not be ignored in dealing with the question of the reasonableness of particular rates or fares.

Until the year 1942 the passenger business of the railroads had for a number of years been a continuing source of loss to them notwithstanding the high fares that prevailed prior to the order of 1936. That order was made reducing coach fares generally to 2 cents per mile, not because there were excessive revenues from passenger business warranting the reduction, but because it was thought that, in view of prevailing conditions, that fare would produce greater revenues than the higher fares and would more nearly approximate a just fare in view of what the service rendered was reasonably worth. At the same time, southern carriers were allowed to put into effect the experimental 1.5 cents coach fare, in an effort to recover some [fol. 1122] of the passenger business that they had lost and to increase the revenues of a branch of the business that showed a constant and increasing deficit. At that time, the question of the reasonableness of passenger fares was thoroughly examined from every angle. See Passenger Fares and Surcharges 214 I. C. C. 174.

The reasonableness of passenger fares was again submitted to a searching inquiry by the Commission in its report of March 2, 1942, in Ex Parte No. 148, wherein, following certain wage increases and a showing of other increased costs, it approved an increase of 10 percent in passenger fares and a smaller proportionate increase of freight rates. In granting the increase, the Commission said (248 I. C. C. 545, 565): "Because of the abnormal conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute toward meeting the added operating costs of the railroads." The reasonableness of the general level of passenger fares was again considered in connection with

Ex Parte 148, in the Commission's report of April 6, 1943, in which, while suspending the freight rate increases, it declined to suspend the increase in passenger fares. 255 I. C. C. 357. The Commission said (pp. 394-395): "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight. [fol. 1123] * * * We find no modification of our previous findings, orders, and authorizations respecting the present interstate standard passenger fares is necessary." The matter was again dealt with by the Commission in its supplemental report of November 8, 1943, 256 I. C. C. 502.

The order of the Commission permitting the southern carriers to abandon the experimental coach fare of 1.5 cents per mile, and to raise their interstate coach fare to the standard coach fare of 2.2 cents per mile, was entered on August 1, 1942; and the order in Ex Parte No. 148 was modified accordingly. The increase was made, therefore, in the course of proceedings in which the general level of passenger fares was thoroughly investigated and the facts justifying the fares established were fully found. These findings were before the Commission in the proceeding to raise intrastate fares and were properly considered along with the other evidence adduced. Without regard to the other evidence, they fully justified the findings of the Commission as to the reasonableness of the interstate fares. An examination of the record shows, however, that ample evidence was introduced to support the findings that the interstate fares were reasonable. That the Commission gave due consideration to the evidence as to increase in passenger traffic and revenues since the beginning of the war is shown by the following passage from its report, p. 142:

> "The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the

years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads of the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte No. 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943, such as inductions into the armed forces of great numbers of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movement of Army troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary."

[fol. 1124] The argument is made that, having approved a fare of 1.5 cents in a period of depression when the railroads were losing money on their passenger business, the Commission cannot, except by arbitrary action, now approve a fare of 2.2 cents, in a time of prosperity when the passenger business has increased until it is a source of unexpected profit. The answer, of course, is that the low fare was allowed as an experiment in an effort to recapture lost passenger business. With the increase of passenger business, the necessity for the low fare to attract business has passed, and the fare can now be fixed without reference to that consideration. It is elementary that, a reasonable basis being shown, the fixing of a rate or fare is a matter for the Commission and not for the courts, and that the courts, on review of an order of the Commission, may not substitute their judgment for that of the Commission as to its reasonableness. Florida v. United States, supra, 292 U. S. 1, 12; Union Pac. R. Co. v. United States 222 U. S. 541, 547.

It is argued, also, that it was incumbent upon the Commission, in condemning intrastate fares as discriminatory, to determine the reasonableness of interstate fares in the light of existing conditions and not of conditions that existed in former years; but it is clear that the Commission has had existing conditions in mind in finding the interstate fares to be reasonable. It is well settled that ordinarily the

experience of a single year is an unsafe guide in fixing rates. United Gas Public Service Co. v. Texas 303 U. S. 123, 145; West Ohio Gas Co. v. Public Utilities Com. 294 U. S. 79, 81. Particularly is this true when the single year is a war year and the conditions are abnormal. What weight shall be accorded a temporary increase of business due to war conditions is manifestly a matter for the Commission and not for the courts.

There is no force whatever in the argument that the [fol. 1125] finding as to reasonableness of interstate fares was made without notice and hearing. As indicated above the findings upon which interstate passenger fares were fixed and upon which the 10 per cent increase was allowed (the abandonment of the experimental coach fare being permitted in connection with the latter) were made after the fullest hearing and investigation, with two hearings on petitions of the Price Administrator as to whether the increases in rates and fares should not be suspended in the interest of price stabilization. In addition to these, consideration was given by the Commission to the evidence adduced on the hearing on intrastate fares. It is true that the North Carolina Commission in July 1943 filed with the Interstate Commission a petition asking the latter for a general investigation on its own motion of the reasonableness of interstate coach fares to, from and through North Carolina, and that the Interstate Commission refused to take action on the petition; but the Commission referred to the petition in the report accompanying the order here complained of and stated that the record did not warrant any modification of its conclusions in Ex Parte No. 148. Whether the Commission, having so recently and so fully considered the reasonableness of interstate fares would again go into the question was a matter well within its discretion. I. C. C. v. Jersey City — U. S. —, 64 S. Ct. 1129, 1135; Illinois Com. Com. v. United States 292 U. S. 474, 480. As was said by the Supreme Court in the Jersey City case:

> "Only once in the history of administrative law has this Court reversed a Commission for refusing to grant a rehearing on the contention that the record was 'stale' • • • The Court, however, promptly restricted that decision to its special facts. United States v. Northern Pacific R., 288 U. S. 490, 53 S. Ct. 406, 77 L. Ed. 914,

and it stands virtually alone. In Baltimore & Ohio R. Co. v. United States, 298 U. S. 349, 389, 56 S. Ct. 797, 817, 80 L. Ed. 1209, Mr. Justice Brandeis, concurring, said, 'The Atchison case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing.' * * *

"This Court has held that the Interstate Commerce Commission did not abuse its discretion in refusing a [fol. 1126] request for a new study as a basis for rate-making, although changes were alleged consisting of a falling off in volume of traffic, improvement of highways in the District resulting in diversion of traffic from rail to truck, decline in value of the articles transported, reduction in wages and cost of supplies, and curtailment of the amount of service rendered, and where the Commission decided that it was able on the record before it to consider the effect of the factors suggested by the appellants and that a new cost study was unnecessary. Illinois Commerce Commission v. United States 292 U. S. 474, 480, 54 S. Ct. 783, 785, 78 L. Ed. 1371. Except that the trends are in an opposite direction, the inquiry demanded here is of the same nature. See also Georgia Public Service Commission v. United States, 283 U. S. 765, 769, 770, 51 S. Ct. 619, 620, 621, 75 L. Ed. 1397.

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"The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. United States ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission, 66 App. D. C. 398, 88 F. 2d 780, 784, certiorari denied 300 U. S. 684, 57 S. Ct. 754, 81 L. Ed. 886; Mississippi Valley Barge Line Co. v. United States, D. C., 4 F. Supp. 745, 748; Union Stock Yards Co. v. United States, D. C., 9 F. Supp. 864, 873; American Commission Co. v. United States, D. C., 11 F. Supp. 965, 972; R. C. A. Communications, Inc., v. United States, D. C., 43 F. Supp. 851, 858."

The North Carolina Commission could not demand that the Interstate Commission make a new and independent in-

vestigation as a prerequisite to its order raising intrastate fares. That order was but a step in the process of adjusting the rate structure of the nation and was properly predicated upon the findings as to intrastate fares already made. The matter was well put by the Supreme Court in the Jersey City case, supra, as follows:

> "Nor can a litigant insist that a commission may not take a second step in a rate-making process without retracing all previous ones. As put by the Chief Justice: 'The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details'. Such procedure may be adopted where it is appropriate to carry out the provisions of an act. Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 584, 62 S. Ct. 736, 742, 86 L. Ed. 1037."

Answering a somewhat similar contention in Illinois Com. Com. v. United States, supra, and denying that the Commission was required to make a further cost study based on [fol. 1127] alleged changed conditions, the Supreme Court said:

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts."

Plaintiffs contend that the reasonableness of intrastate fares was excluded from consideration at the hearing by a statement of the Examiner. There is no merit in the contention. At the beginning of the hearing, counsel for North Carolina stated that it was his understanding that the reasonableness of interstate fares was not in issue and

the Examiner responded: "Well, it is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise, it is not in issue. It is not subject to attack, and the parties are at liberty to show what facts they have and they [their?] position on that particular question." No objection was voiced to the Examiner's statement and the question as to the reasonableness of the interstate fares was fully considered by the Commission. As indicated above, we think that the Commission would have been acting reasonably and within its powers, if it had treated the reasonableness of the interstate fares as settled by the recent proceedings, and had considered in the proceeding before it merely the question as to whether the North Carolina fares were discriminatory. When the Commission had so recently made an adjustment of interstate fares after a nation-wide inquiry, it was not required to go [fol. 1128] over this work again in a proceeding to bring intrastate rates into harmony with them.

Intrastate Fares Discriminatory

The reasonableness of the interstate fares being established, there can be little question as to the discriminatory character of the intrastate fares. It is established that the same service is afforded intrastate passengers as is afforded in interstate service; and, where this is true, discrimination is ordinarily established with sufficient certainty by showing a difference in rates. As said in Illinois Com'n v. United States 292 U. S. 474, 485, "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions." Defendants endeavor to justify the difference in fares by contrasting the service rendered by the streamlined de luxe interstate trains with the poor service afforded by the branch lines; but intrastate passengers travel on the streamlined interstate trains and interstate passengers travel on the branch lines. The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and en-

joy the same accommodations. It is nothing short of nonsense to say that under such circumstances an intrastate fare of 1.65 as against an interstate fare of 2.2 does not constitute an undue discrimination in favor of intrastate passengers and against interstate passengers. When such discrimination is shown on a statewide scale a general finding of a discrimination is sufficient, and there is no need of a finding of discrimination against particular persons or with respect to particular fares. See United States v. [fol. 1129] Louisiana 290 U. S. 70, 79 (distinguishing Florida v. United States 282 U. S. 194, upon which plaintiffs particularly rely) where the Court said:

> "The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting in the aggregate a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate.
>
> "A question different from that before us was presented in Florida v. United States, supra. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in Northern Florida. It involved only one railroad and one commodity."

And it is equally clear that discrimination has been shown within the meaning of the statutory provision against the interstate commerce of the carriers in that, because of the intrastate fare, intrastate passengers are not making their proportionate contribution to the maintenance of the transportation system. The intrastate fare produces in North Carolina $525,000 less than would be produced by the interstate fare on the same volume of traffic, which means that intrastate passengers have paid just that much less than the Commission estimates to be their proper con-

tribution for the service rendered. A failure of intrastate traffic to bear its just burden of expense means necessarily that a greater burden must be borne by interstate traffic if the transportation system is to be maintained at the level of efficiency which section 15a(2) contemplates; and this is unquestionably an undue discrimination against interstate commerce within the meaning of section 13(4).

It is not necessary for the Commission to find, as a prerequisite to an order raising intrastate fares, that such [fol. 1130] fares are noncompensatory or will result in a deficit in operating revenues of that particular branch of the business. On the contrary, it is for the Commission to say what portion of the revenue necessary to an adequate and efficient transportation system the various kinds of businesses engaged in by the carriers shall contribute; and an undue burden upon and discrimination against interstate commerce is shown where intrastate rates for a particular service are so low that the service will not contribute its proportionate part of the revenue necessary to the plan which the Commission has devised for the development of the interstate system. It would greatly burden if not entirely wreck the transportation system of the country for local commissions to have the power to base intrastate rates or fares on their ideas as to how the expense of maintaining an adequate transportation system should be apportioned among the various classes of business carried on by the carriers. We must bear in mind, in this connection, what was so wisely said by Chief Justice Taft in the Wisconsin case, supra, that "commerce is a unit and does not regard state lines"; that the affirmative power of Congress in developing interstate commerce is clear; and that, "in such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable."

It must not be overlooked that the carriers here who are carrying intrastate passengers are interstate carriers; and that it is only because of their interstate business that they are able to furnish the present level of intrastate service. The Commission has fixed the rates and fares on their various classes of business with a view of maintaining their efficiency as interstate carriers for the service of the public; and the rate structure so carefully constructed should not be burdened by lower intrastate rates because local regulatory

[fol. 1131] bodies may entertain different theories of rate making. These observations apply with peculiar force in the case at bar, where it appears that the interstate fares fixed by the Commission have been accepted as reasonable intrastate fares by 44 of the 48 states of the Union. In the language of the Louisiana case, supra, there is nothing in the conditions prevailing in the other four states "so different from the rest of the country as to lead to the conclusion that the intrastate rates raised to the reasonable general interstate level, would not themselves be reasonable."

Consideration Given Stabilization Act

The contention that adequate consideration was not given by the Commission to the representatives of the Price Administrator under the Stabilization Act, requires but brief consideration. The record shows that full consideration was given the representations of the Price Administrator, both in the hearings in Ex Parte No. 148 and in the hearing which resulted in the order here involved. As a matter of fact, the reopening of proceeding Ex Parte No. 148 resulted in the suspension of the authorized increase in freight rates; and the Commission, in the passage of its order of April 6, 1943, above quoted, 255 I. C. C. 357, 394-395, pointed out why passenger fares were treated differently. In the report accompanying the order here complained of the Commission showed that it had given full consideration to the contentions of the Price Administrator, saying:

> "The Price Administrator contends that the proposed increase in fares is inconsistent with the wartime stabilization program; further, that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if we should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares. In Increases in Texas Rates, Fares, and Charges, 253 I. C. C. 723, and in the report on further hearing in Increased Railway Rates, Fares, and Charges, supra, we discussed contentions [fol. 1132] that rate increases therein proposed would be inconsistent with the efforts of the Government to avoid inflation and would conflict with the provisions of the Emergency Price Control Act of 1942, as

amended by the Stabilization Act, and executive regulations thereunder. We concluded that the provisions of these acts, except those pertaining to the giving of notice and consent to intervene to the designated federal agent, made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by railroad. The provisions of these acts respecting the giving of notice and consent to intervene to the designated federal agent have been complied with in each of these proceedings. The evidence bearing upon the further contention of the Price Administrator has been recited hereinbefore."

An examination of the report in Increases in Texas Rates, Fares and Charges 253 I. C. C. 723, 734-736, referred to in the above quotation, shows that the Commission was fully aware of its duty under the Stabilization Act and was discharging it in accordance with the spirit as well as the letter of that act. What weight was to be accorded the contentions advanced by the Price Administrator pursuant to the act, was a matter committed to the discretion of the Commission; and the right to review the exercise of that discretion is given neither to the Price Administrator nor to this Court. Whatever question might have existed with regard to this was set at rest by the recent decision of the Supreme Court in the Jersey City case, supra, where Mr. Justice Jackson, speaking for the Court, said:

"The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. It is without power to protect these essential transportation agencies from raising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. * * * The delicacy of the Commission's

task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. *We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court, to determine.* The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the company. Cf. Hudson & Manhattan R. Co. v. United States, 313 U. S. 98, 61 S. Ct. 884, 85 L. Ed. 1212. If Congress desires to [fol. 1133] grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals." (Italics supplied).

We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered.

Our conclusion is that the order complained of is a valid exercise of power by the Commission; that it is supported by sufficient findings of fact, which in turn are supported by substantial evidence; that it is not arbitrary or unreasonable; and that it is not rendered invalid by anything contained in the Stabilization Act. The injunction prayed for will accordingly be denied and the suit will be dismissed. Because of an intimation in the argument that, in the event of an adverse decision, plaintiffs would ask a stay pending appeal, we have given consideration to that matter and are of opinion that such stay should not be granted. Not only is the order of the Commission clearly valid in our opinion, but no circumstances have been shown which would justify this Court in ordering that it be stayed. Being entered by the Commission, it is presumptively in the public interest; its effect is merely to require intrastate passengers in North Carolina to pay

the fares that interstate passengers are paying throughout the country and that intrastate passengers are paying in all except four of the States; and it is not possible to provide against damage which might result from a stay by requiring a bond. Under such circumstances, we think [fols. 1134-1135] it clear that we should not grant the stay. Virginian Ry. v. United States 272 U. S. 658, 673. As said in the case cited:

> "An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.
>
> "In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree ssutaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become

operative until its validity can be considered by this Court."

Injunction Denied and Suit Dismissed.

John J. Parker, United States Circuit Judge, Fourth Circuit; I. M. Meekins, United States District Judge, Eastern District of North Carolina; Johnson J. Hayes, United States District Judge, Middle District of North Carolina.

[fol. 1136] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPELLANTS', STATE OF NORTH CAROLINA AND OTHERS, PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL FROM FINAL DECREE—Filed September 20, 1944

To the Clerk of the Above Entitled Court:

You are hereby requested to prepare a consolidated transcript of the record in the above entitled action to be filed in the Supreme Court of the United States, pursuant to an appeal therein from the final decree of said Court which was entered July 22, 1942, and pursuant to an order therein allowing an appeal and you are further requested to include in the consolidated transcript of record here requested the entire record before the District Court here in this cause including such evidence as was received by said Court and such exhibits and evidence in the form of exceptions as was offered before said Court at said hearing and including the original complaints, petitions, answers and other pleadings, the original record of the proceedings before the Interstate Commerce Commission in its docket No. 29036, North Carolina Intrastate Coach Fares, the notice of appeal, petition for appeal, assignments of errors in behalf of plaintiffs, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers & Mfrs. Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. [fols. 1137-1138] Russell, the order allowing the appeal of said parties, the citation of appeal, the jurisdictional statement by said appellants with attached decree, findings of fact, conclusions of law and opinion of the District Court

sought to be reviewed in this appeal, the statement by these appellants directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and this praecipe.

For appellants, State of North Carolina and others above named

F. C. Hillyer, J. C. B. Ehringhaus, Attorneys.

[fols. 1139-1140] In United States District Court

[Title omitted]

Petition for Appeal—Filed August 25, 1944

To the Honorable the Judges Above Named:

The above named Plaintiffs, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers & Manufacturers Association, Inc., North Carolina Division of the Travelefs Protective Association of America and B. F. Russell, considering themselves aggrieved by the final decree made and entered in the above entitled cause on July 22, 1944, do hereby appeal therefrom to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith and on the basis of the Supreme Court's jurisdiction upon appeal to review said order and decree as shown in the Jurisdictional Statement also filed herewith, and pray that said appeal be allowed; that a proper order relating to the a citation be issued os provided by law; and that a transcript of the record, proceedings and papers (or so far cript of the record, proceedings and papers (or so far as the Court may direct, the original record in lieu of such transcript) upon which said decree is based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases provided.

Dated, August 19th, 1944.

F. C. Hillyer, J. C. B. Ehringhaus, Attorneys for Plaintiffs.

[fol. 1141] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 25, 1944

The State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers & Manufacturers Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, Plaintiffs in the above entitled cause, file the following assignment of errors with and as part of their petition for appeal to the Supreme Court of the United States from the final decree of the District Court entered July 22, 1944, denying the injunction sought to restrain and set aside the corrected order of Interstate Commerce Commission of May 8, 1944, in Docket No. 29036, North Carolina Intrastate Coach Fares, 258 I. C. C. 133; and dismissing the Petition of said plaintiffs.

Plaintiffs assert that the District Court, in its decree, findings of fact, and conclusions of law, erred in the following respects:

I. The Court erred in declining to admit and consider certain evidence in the form of monthly and annual reports of the carriers and of the I. C. C., and the affidavits with respect thereto, all of which showed that the North Carolina intrastate fares then prevailing did not constitute such a burden on interstate commerce as to give rise to any right in the I. C. C. to interfere with the State's regulation of said intrastate fares, which in fact had yielded and were yielding excessively high revenues.

II. The Court erred in not setting aside, annulling and perpetually enjoining said orders of the Interstate Commerce Commission.

III. The Court erred in dismissing the Petition of the plaintiffs and in denying the relief asked in such Petition.

IV. The Court erred in declining to set aside, annul and enjoin said order of the I. C. C. on the ground that the first finding of fact, to the effect that the Interstate one way and round trip coach fares are just and reasonable, was not supported by substantial evidence.

[fol. 1142] V. The Court erred in declining to set aside, annul, and enjoin said order of the I. C. C. on the ground that

the third finding of fact made by said Commission, that conditions affecting transportation of passengers in coaches in intrastate and interstate movements are substantially similar, was not supported by substantial evidence.

VI. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that the fourth finding of fact made by said Commission, to the effect that interstate passengers in these states suffer an undue and unreasonable disadvantage and intrastate passengers enjoy an undue and unreasonable advantage and preference to the prejudice of interstate passengers, is not supported by substantial evidence.

VII. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that the Commission's fifth finding of fact, insofar as it suggests that intrastate fares were not contributing their fair share of the revenues required to enable respondents to render adequate and efficient transportation service, is not supported by substantial evidence.

VIII. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that the sixth finding of fact made by said Commission, suggesting undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce and undue, unreasonable and unjust discrimination against interstate commerce which should be removed as therein suggested, is not supported by substantial evidence.

IX. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that the Commission had no statutory power to make the same.

X. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that said Commission had contrary to the requirements of Section 13(2) of the Interstate Commerce Act [Title 49 U. S. C. Sec. 13(2)], refused the request made by the State of North Carolina to investigate the reasonableness of interstate rates under then existing conditions and said Commission had no power to make an order such as is here challenged

[fol. 1143] without making the investigation requested by the State.

XI. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that said Commission through its examiner refused an opportunity to investigate the reasonableness of interstate rates under then existing conditions and proceeded to find said interstate rates reasonable on the basis of an order in a former proceeding, viz, Ex Parte No. 148, Increased Railway Rates and Charges, 1942, and the Commission had no power under the statutes and Acts of Congress to so do in the face of a request by the State of North Carolina through its regulatory agency for an investigation into the reasonableness of said rates. In Ex Parte 148 the Commission considered only a general revenue increase of 10 per cent over existing passenger fares and did not consider unit operating cost.

XII. The Court erred in declining to set aside, annul and enjoin said order of the Commission on the ground that said Commission had ordered said change in intrastate rates and the railroads had refused the request of the State regulatory body to furnish certain definite information as to the expenses of intrastate operation which information in definite form was available to said railroads and known by them only.

XIII. The Court erred in declining to set aside, annul and enjoin said order of the Commission because the Commission had declined a full hearing on the reasonableness of the interstate rates as requested by the North Carolina Regulatory Body and as required in such circumstances by the statutes.

XIV. The Court erred in declining to set aside, annul and enjoin said order of the Commission because the Commission declined to consider said admissions made in reports filed with said Commission which showed that the operating costs for intrastate transportation of coach passengers was far below receipts with consequent high profits on such operations to the carriers and which profits were far in excess of the fair return required by law even though said admissions were made subsequent to the hearing before the I. C. C.

XV. The Court erred in declining to set aside, annul and enjoin said order of the Commission because for the first time in the history of railroading, so far as we are advised, said order of the Commission permitted and directed [fol. 1144] an increase of revenue to the carriers when there was shown no revenue necessity therefor and, on the contrary, it appeared from all the testimony that such increase only increased the already excessive profits of the railroads on such operations.

XVI. The Court erred in holding as a rule of law that it is the duty of the Interstate Commerce Commission "to remove unjust discriminations against interstate Commerce resulting from unreasonable intrastate rates."

XVII. The Court erred in holding as a conclusion of law that "the rate structure (of the railroads) so carefully constructed (by the Interstate Commerce Commission) should not be burdened by lower intrastate rates because local regulatory bodies may entertain different theories of rate making."

XVIII. The Court erred in declining to set aside, annul and enjoin said order of the Interstate Commerce Commission on the ground that the intrastate passenger coach fares within North Carolina did not become unlawful as a result of the voluntary action of the North Carolina railroads in increasing interstate fares on October 1, 1942, to take advantage of wartime conditions, which made such increases possible or practical, at a time when the said railroads had no present need for increased revenues in order to provide adequate and efficient railway transportation service.

XIX. The Court erred in declining to set aside, annul and enjoin the order of the Interstate Commerce Commission on the ground that the Commission had no power to order increases of North Carolina intrastate coach fares in order to compensate for passenger service deficits incurred during prior years, which deficits were in fact compensated by a support factor in freight rates.

XX. The Court erred in declining to set aside, annul and enjoin said order of the Interstate Commerce Commission on the ground that in its determination of the reasonableness of the interstate rates and fares, the Commission

failed to give due consideration "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service," as required of said Commission by section 15a(2) of the Interstate Commerce Act.

XXI. The Court erred in the following conclusion of law:

> "The reasonableness of the interstate fares being established, there can be little question as to the discriminatory character of the intrastate fares. It is [fol. 1145] established that the same service is afforded intrastate passengers as is afforded in interstate service; and, where this is true, discrimination is ordinarily established with sufficient certainty by showing a difference in rates."

XXII. The Court erred in holding as a conclusion of law as follows:

> "The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. It is nothing short of nonsense to say that under such circumstances an intrastate fare of 1.65 as against an interstate fare of 2.2 does not constitute an undue discrimination in favor of intrastate passengers and against interstate passengers. When such discrimination is shown on a statewide scale a general finding of discrimination is sufficient, and there is no need of a finding of discrimination against particular persons or with respect to particular fares."

XXIII. The Court erred in declining to set aside, annul and enjoin said order of the Interstate Commerce Commission on the ground that the disparity between the interstate and intrastate passenger coach fares was not shown to have resulted in any material injury to persons engaged in interstate or foreign commerce or to have resulted in any substantial burden upon interstate or foreign commerce.

XXIV. The Court erred in declining to set aside, annul and enjoin the order of the Interstate Commerce Commis-

sion on the ground that the Commission was not justified in overruling action of the North Carolina Utilities Commission made in conformity with Stabilization Act of 1942 and the President's Executive Order 9328, section 4, 8 F. R. 4681, which ruling of the North Carolina Utilities Commission was made at the request of the Economic Stabilization Director and the Price Administrator.

XXV. The Court erred in sustaining, and in itself applying, an erroneous rule of law applied by the Commission in that it ordered said increase in intrastate rates in order to bring about uniformity or simplification which would destroy absolutely the power of intrastate regulation.

XXVI. The Court erred in approving the action of the Commission in applying an incorrect principle of law by grounding its action in part upon the desireability to aid in rationing travel.

XXVII. The Court erred in approving the action of the Commission in applying an incorrect principle of law by grounding its action in part upon the costs of troop train movements to the carriers which service by the carriers is compensated by the Government itself.

XXVIII. The Court erred in approving the action of the Commission in grounding its conclusion in part upon an [fol. 1146] incorrect principle of law in considering the costs of furlough fares to the carriers.

XXIX. The Court erred in approving the action of the Commission in the application of an incorrect principle of law through grounding its conclusion in part upon the desirability of permitting the carriers to recoup through these increased rate losses in past years.

XXX. The Court erred in its finding that the Commission's finding that said interstate fares were just and reasonable was supported by substantial evidence.

XXXI. The Court erred in its finding that the Commission's conclusion that conditions affecting interstate and intrastate transportation in the State of North Carolina were substantially similar, and that the disparity between interstate and intrastate coach fares, constituted a discrimination in favor of the intrastate passengers and

against interstate passengers using the same facilities, and that these findings were supported by substantial evidence.

XXXII. The Court erred in its fifth finding insofar as it approved the finding of the Commission that traffic moving under the lower intrastate fares is not contributing its fair share of the revenues required to enable the carrier to render adequate and efficient transportation service, and in concluding that this finding was supported by substantial evidence.

XXXIII. The Court erred in its sixth finding in approving the Commission's conclusion that the maintenance of the lower intrastate coach fares in North Carolina causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce and undue, unreasonable and unjust discrimination against interstate commerce, and that this unlawfulness should be removed by increasing intrastate fares to the level of interstate fares, and in holding that said finding was supported by substantial evidence.

XXXIV. The Court erred in its seventh finding to the effect that the Commission had afforded a full and fair hearing to plaintiffs.

XXXV. The Court erred in its eighth finding to the effect that the report of the Commission, 258 I. C. C. 133, and the basic findings, as well as the ultimate findings therein contained, are supported by substantial evidence.

XXXVI. The Court erred in its first conclusion of law [fols. 1147-1148] to the effect that the findings and order of the Commission are based on substantial evidence, do not involve any error of law and are not arbitrary or unreasonable.

XXXVII. The Court erred in its second conclusion of law that the Commission properly required that railroads serving the State of North Carolina to establish and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

XXXVIII. The Court erred in its third conclusion of law that the injunction should be denied and suit should be dismissed.

XXXIX. The Court erred in failing to find as a fact that no locality and no group or representative of coach travelers and no coach traveler had complained to the Commission or the Court of any burden or discrimination against them by reason of the difference in intrastate and interstate fares, but that on the contrary representatives of traveling groups had intervened in this case and in all prior proceedings to protect against the increase which is here ordered.

Wherefore these appellants pray that said final decree entered July 22, 1944, be reversed.

This August 19, 1944.

F. C. Hillyer, J. C. B. Ehringhaus, Attorneys.

[fols. 1149-1150] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed August 21, 1944

In the above entitled cause, the State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, having made and filed a Petition for Appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on July 22, 1944, and having also made and filed an Assignment of Errors, and a Jurisdictional Statement, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed for; and it is

Further Ordered that a certified transcript of the record herein be transmitted in due course to the Supreme Court of the United States (except as the Court may direct that part of the original record herein shall be transmitted in lieu of a transcript thereof); and it is

Further Ordered that the bond of said plaintiffs on said appeal be fixed at the sum of One Thousand Dollars ($1,000), the same to be and act as a bond for costs but not as a supersedeas; and that the appeal bond in the sum of One Thousand Dollars ($1,000), wherein the North Carolina Utilities Commission is principal and Hartford Accident and Indemnity Company is surety, conditioned for payment of costs

upon said appeal and presented for approval be, and it is hereby, approved and ordered filed.

Dated August 19th, 1944.

I. M. Meekins, United States District Judge.

[fols. 1151-1152] In United States District Court

[Title omitted]

Order Extending Time for Filing Record in the Supreme Court—Filed September 23, 1944

In this matter for good cause shown by appellants, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers & Mfrs. Assoc., Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, and before the time for filing has expired under the original order in this matter made by the undersigned, the time for docketing said appeal is hereby enlarged and extended to and including October 9, 1944, under the provisions of Rule 11 of the Supreme Court of the United States.

It is further ordered that the Clerk of the District Court send along with the record to the Supreme Court of the United States the several exhibits introduced before the District Court as original exhibits at the hearing in this cause. The original of this order will be forwarded immediately to the Clerk of the Supreme Court of the United States and duplicate signed copy thereof will be filed in the office of the Clerk of this Court.

I. M. Meekins, U. S. District Judge Eastern District of N. C.

This 21st day of September, 1944.

[fol. 1153] In United States District Court

[Title omitted]

Appellants' Praecipe for Transcript of Record on Appeal from Final Decree—Filed September 28, 1944

To the Clerk of the Above-Entitled Court:

You are hereby requested to prepare a transcript of the record in the above-entitled action to be filed in the Supreme

Court of the United States, pursuant to an appeal allowed therein, from the final decree of the Court, entered July 22, 1942, and to include in such transcript of record the original complaints, petitions, answers, and other pleadings: the evidence submitted by the parties to the Court, including the original of the record of the proceedings before the Interstate Commerce Commission in its Docket No. 29036, North Carolina Intrastate Coach Fares; the notice of appeal, petition for appeal, and assignment of errors on behalf of the Economic Stabilization Director by the Price Administrator, the order allowing such appeal, citation of appeal, jurisdictional statement by said appellants with attached decree, findings of fact, conclusions of law, and opinion of the District Court sought to be reviewed, statement by plaintiffs-appellants directing attention to paragraph 3 of Rule 12 of the revised rules of the Supreme Court of the United States, and this praecipe.

For the Economic Stabilization Director by the Price Administrator Richard H. Field, General Counsel. [fols. 1154-1155] David F. Cavers, Assistant General Counsel. Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Division. M. D. Miller, Chief Counsel, Common Carrier Section Transportation and Public Utilities Division, Office of Price Administration, 5319 Federal Office Building No. 1, 2nd & D Streets, S. W., Washington 25, D. C.

Dated, September —, 1944.

[fol. 1156] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed September 21, 1944

To the Honorable the Judges Above Named:

The above-named Plaintiffs, the Economic Stabilization Director by the Price Administrator, considering themselves aggrieved by the final decree made and entered in the above-entitled cause on July 22, 1944, do hereby appeal therefrom to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed here-

with, and on the basis of the Supreme Court's jurisdiction upon appeal to review said order and decree as shown in the Jurisdictional Statement also filed herewith, and pray that said appeal be allowed; that a citation be issued as provided by law; and that a transcript of the record, proceedings and papers (or so far as the Court may direct, the original record in lieu of such transcript) upon which said decree is based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases provided.

For the Economic Stabilization Director by the Price Administrator Richard H. Field, General Counsel. David F. Cavers, Assistant General Counsel. [fols. 1157-1158] Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Division. M. D. Miller, Chief Counsel, Common Carrier Section Transportation and Public Utilities Division, Office of Price Administration, 5319 Federal Office Building No. 1, 2nd & D Streets, S. W., Washington, 25 D. C.

Dated, September 16, 1944.

[fol. 1159] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERROR—Filed September 21, 1944

The Economic Stabilization Director by the Price Administrator, Intervenor-Plaintiffs in the above-entitled cause, file the following assignment of error with and as part of their Petition for Appeal to the Supreme Court of the United States from the final decree of the District Court for the Eastern District of North Carolina, entered July 22, 1944, denying an injunction and order to restrain and set aside, and annul the corrected order of the Interstate Commerce Commission, dated May 8, 1944, in Docket No. 29036, North Carolina Intrastate Coach Fares, 258 I.C.C. 133, so far as said order required the North Carolina railroads to increase intrastate passenger coach fares in said State, and further ordering and decreeing that the Complaint of Intervenor-Plaintiffs be dismissed.

Intervenor-Plaintiffs assert that the District Court, in its decree and conclusions of law, erred with respect to the conclusion of law that the findings and order of the Commission are based on substantial evidence, do not involve any error of law and are not arbitrary or unreasonable. In particular, the District Court erred as a matter of law in concluding that there was substantial evidence of record to sustain, consistently with the Commission's duty to "give full effect to wartime conditions and the stabilization legislation," the Commission's finding that an undue, unreasonable, and unjust discrimination against interstate commerce, within the meaning of section 13 (4) of the Interstate Commerce Act, had resulted from the order of the North Carolina Utilities Commission declining to authorize intrastate passenger fare increases under wartime condi-
[fols. 1160-1161] tions productive of net revenues (including net passenger operating revenues) in excess of those required to meet maintenance and operating costs and to yield a fair return.

Wherefore, Plaintiffs-Appellants, the Economic Stabilization Director by the Price Administrator, pray that said final decree entered July 22, 1944 be reversed.

Respectfully submitted Chester Bowles, Price Administrator; Richard H. Field, General Counsel; David F. Cavers, Assistant General Counsel; Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Counsel; M. D. Miller, Chief Counsel, Common Carrier Section, Transportation and Public Utilities Division, Office of Price Administration, 5319 Federal Office Building No. 1, 2nd & D Streets, S. W., Washington 25, D. C.

Dated, September 16, 1944.

[fols. 1162-1163] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Sept. 21, 1944

In the above-entitled cause, the Economic Stabilization Director by the Price Administrator, having made and filed a Petition for Appeal to the Supreme Court of the

United States from the final decree of this Court in this cause entered July 22, 1944, and having also made and filed an Assignment of Errors, and a Jurisdictional Statement, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed for; and it is

Further Ordered that a certified transcript of the record herein be transmitted in due course to the Supreme Court of the United States (except as the Court may direct that part of the original record herein shall be transmitted in lieu of a transcript thereof).

I. M. Meekins, United States District Judge.

Dated, September 18th, 1944.

[fol. 1164] IN SUPREME COURT OF THE UNITED STATES

No. 560

STATEMENT OF POINTS WHICH THE STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS AND MANUFACTURERS' ASSO., INC., NORTH CAROLINA DIVISION OF THE TRAVELERS' PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL INTEND TO RELY AND THE PARTS OF THE RECORD WHICH ARE NECESSARY FOR CONSIDERATION THEREOF—Filed October 20, 1944

The State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers' Asso., Inc., North Carolina Division of the Travelers' Protective Association of America and B. F. Russell, hereinafter referred to as "North Carolina", appellees in this appeal for the reversal of the decree of the District Court of the United States for the Eastern District of North Carolina will reply upon all the points raised by their assignments of error herein, including among others the following points:

[fol. 1165] Point I. North Carolina was denied a full hearing.

Note. This Point is applicable to Assignments of Error Nos. I, XII, XIII, XIV, XXXIV.

Point II. The District Court erred in excluding affidavits containing simple computations from reports of carriers to the Commission which, by stipulation, had been made a part of the evidence before the Commission, and which prove conclusively that the existing fares are extortionate, and the rates of return grossly excessive.

Note. This Point is applicable to Assignments of Error Nos. I, XXXIV.

Point III. The expense per coach passenger mile in 1943 was less than half of the intrastate fare; the passenger operating ratios were lower than freight, and the rates of return of the four North Carolina railroads were three times the standard rate of return.

Note. This Point is applicable to Assignments of Error Nos. I, IV, VII, X, XI, XIV, XV, XVIII, XXX, XXXV.

Point IV. The Court erred in failing to consider these conclusive facts.

Note. This Point is applicable to Assignments of Error Nos. I, IV, VII, XIV, XV, XVIII, XXX, XXXV.

Point V. There was no substantial evidence that the interstate fares are reasonable, or that the intrastate fares were unreasonably low or non-compensatory.

Note. This Point is applicable to Assignments of Error Nos. IV, VII, XI, XV, XVIII, XXX, XXXI.

[fol. 1166] Point VI. Transportation should be provided at the lowest cost consistent with the furnishing of adequate service.

Note. This Point is applicable to Assignments of Error Nos. XXXII and XX.

Point VII. Fares cannot lawfully be increased to Compensate for passenger deficits in former years.

Note: This Point is applicable to Assignments of Error Nos. XIX and XXIX and North Carolina's Petition for Further Hearing, pages 20 and 21, citing *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 62 S. Ct. 736, p. 590 (747).

Point VIII. Rates of return should be computed by use of net railway operating income before deducting federal income and excess profits taxes.

Note. This Point is applicable to Assignments of Error Nos. VII, XIV, XV.

Point IX. Fares should not be increased while the carriers are earning three times the standard rate of fair return.

Note. This Point is applicable to Assignments of Error Nos. IX, XIV. (Exhibit 20, p. 1. O. P. A. Complaint Table 1; North Carolina's Petition to the Court, Amended Appendix B.)

Point X. Civilian passengers cannot lawfully be required to pay increased fares in order to meet the high costs of troop movements, or lower furlough fares, or extra investment in streamlined trains which are practically unavailable to intrastate travelers in North Carolina.

Note. This Point is applicable to Assignments of Error Nos. V, IX, XXVII, XXVIII.

Point XI. The North Carolina railroads do not need additional revenue. This is not a "revenue-need" case.

Note. This Point is applicable to Assignments of Error Nos. I, VII, XV, XVI, XVIII.

[fol. 1167] Point XII. The intrastate fares do not burden interstate commerce or cause unjust discrimination against interstate commerce.

Note. This Point is applicable to Assignments of Error Nos. VIII, XVI, XVII, XVIII.

Point XIII. No finding of prejudice against persons can be made where no person complained or testified as to any alleged preference of intrastate commerce.

Note. This Point is applicable to Assignments of Error Nos. VI, XXIII, XXX, XXXIII, XXXIX.

Point XIV. Definite and certain proof of injury to persons is required to support a finding of undue preference and prejudice under Section 13(4) of the Act.

Note. This Point is applicable to Assisgnments of Error Nos. VI, VIII, XXIII, XXXI, XXXIII, XXXIX.

Point XV. A mere showing of difference in fares is not sufficient to establish discrimination or perjudice against interstate persons.

Note. This Point is applicable to Assignments of Error Nos. VI, XXI, XXXIII, XXXIX.

Point XVI. Passengers in a typical intrastate journey in non-reserved seat, overcrowded coaches, on slow trains do not enjoy the same accom-odations as those which are accorded to interstate passengers to or through North Carolina in reserved seat, comfortable de luxe coaches on fast streamlined trains.

Note. This Point is applicable to Assignments of Error Nos. V, VI, XXII, XXXI, XXXIII, XXXV.

[fol. 1168] Point XVII. North Carolina's withholding of its approval of the increase sought by four North Carolina roads was in conformity with the Stabilization Act, the President's Order freezing rates and fares, and the request of the Economic Stabilization Director and the Price Administrator.

Note. This Point is applicable to Assignment of Error No. XXIV.

Point XVIII. The Commission has no power to increase intrastate fares simply to bring about "uniformity" with the interstate fares.

Note. This Point is applicable to Assignment of Error No. XXV.

Point XIX. The District Court erred in not setting aside the Commission's Order, in dismissing North Carolina's Petition, in finding that the Commission's conclusions are supported by substantial evidence; in finding that the Commission's findings and order do not involve any error of law and are not arbitrary or unreasonable; and in finding that the Commission properly required the railroads to increase their intrastate fares to the interstate level.

Note. This Point is applicable to Assignments of Error Nos. II, III, XXXV, XXXVI, XXXVII.

Point XX. The District Court should have granted the relief prayed for in the petition; and should have granted the injunction and set aside the order of the Interstate Commerce Commission.

Note. This Point is applicable to Assignment of Error No. XXXVIII.

[fol. 1169] Parts of the Record Necessary for the Consideration of the Points Above Mentioned

And the said appellees respectfully represent that the whole of the record was necessary for the consideration of the points above specified.

J. C. B. Ehringhaus, F. C. Hillyer.

Service of copy of the foregoing statement of points to be relied upon is hereby accepted this 19th day of October, 1944.

J. Stanley Payne, F. W. Gwathmey, Charles Clark, M. D. Miller, Robert L. Pierce.

[fol. 1170] [File endorsement omitted.]

[fol. 1171] IN THE SUPREME COURT OF THE UNITED STATES

No. 561

APPELLANTS' DESIGNATION OF POINT INTENDED TO BE RELIED UPON—Filed October 21, 1944

Appellants Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, hereby adopt the point contained in their Assignment of Error heretofore filed herein, for the point on which they intend to rely on their appeal to this Court from the final decree dismissing their complaint entered by the District Court of the United States for the Eastern District of North Carolina on July 22, 1944.

For the Economic Stabilization Director by the Price Administrator

Richard H. Field, General Counsel; David F. Cavers, Assistant General Counsel; Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Division; M. D. Miller, Chief Counsel, Common Carrier Section.

[fol. 1172] The undersigned acknowledge receipt of a copy of the attached Designation of Point to be Relied Upon by appellants, Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, vs. The United States of America, Interstate Commerce Commis-

sion, Aberdeen and Rockfish Railroad Co., et al., U. S Supreme Court Docket No. 561, October Term, 1944.

Signature of recipient	Date Received
J. Stanley Payne	Oct. 21, 1944
Charles Fahy, Solicitor General	10/21/44
Charles Clark	Oct. 21, 1944

A copy of the above-named Designation was served on Mr. Frank W. Gwathmey by the undersigned by delivery to his office, 1110 Shoreham Building, 15th and H Sts., N. W., Washington, D. C., this 21st day of October, 1944.

M. D. Miller.

[fol. 1173] [File endorsement omitted.]

[fol. 1174] IN THE SUPREME COURT OF THE UNITED STATES

No. 560

[Title omitted]

No. 561

[Title omitted]

APPELLANTS' JOINT DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed October 21, 1944

Petition of North Carolina, et al., with all appendices and affidavits.

Petition to Intervene by Charlotte Shippers Assoc.

Petition to Intervene by North Carolina Division of Travelers Protective Assoc.

Orders granting Intervention.

Motion to Intervene by Stabilization Director.

Order Granting Intervention.

Amended Complaint of Stabilization Director with attachments.

Answer of the Interstate Commerce Commission including the attached report of the Commission in Docket No. 29036.

Answer and amended answer of United States.

Answer of the Interstate Commerce Commission to Amended Complaint of Stabilization Director.

Motion to Intervene by Railroads.

Answer of Railroads.

Transcript of Proceedings before District (3 Judge) Court

[fol. 1175] The following items certified as of record in the proceeding before the Interstate Commerce Commission in Docket No. 29036:

Petition on behalf of Railroads operating in the State of North Carolina, dated July 22, 1943, with appendices.

Interstate Commerce Commission order of October 13, 1943, in Docket No. 29036.

Stenographers minutes of the hearing before the Interstate Commerce Commission in Docket No. 29036.

Exhibits 1 to 20, inclusive, in the proceeding before the I. C. C. in Docket No. 29036, except that Appendix A to Exhibit 14, being the opinion and order of the North Carolina Utilities Commission in Docket No. 2789, is not to be printed, as it is part of the Railroad Petition dated July 22, 1943.

Pages 22, 23, and 24 of the Stenographer's minutes of the Oral Argument before the I. C. C. on February 18, 1944.

Petition of the Price Administrator for Reconsideration, dated April 26, 1944.

Petition of the North Carolina Utilities Commission, et al., for further hearing, etc., dated April 26, 1944.

Railroads' Reply to Petitions for Reopening, Reargument, and Reconsideration, dated May 5, 1944 (separately certified).

Railroads motion for entry of order, dated May 1, 1944.

Reply to railroads motion for entry of the 13th section order, dated May 9, 1944.

Interstate Commerce Commission corrected order of May 8, 1944, in Docket No. 29036, etc.

Order of May 8, 1944, in Docket No. 29036, etc., denying petitions for reconsideration.

Order of Interstate Commerce Commission dated June 7, 1944, extending effective date of corrected order of May 8, 1944, to become effective August 1, 1944.

Certified copy of Request by Utilities Commission of North Carolina of railroads for certain data.

Amended Affidavit of Frank A. Downing.

Certified copy of Commission's Order of January 21, 1942, in Case No. 148.

Commission's Order of August 1, 1942, in Ex Parte 148.

Affidavit of J. S. Tassin.

Affidavit of L. L. Oliver.

[fol. 1176] Decree, Findings, and Opinion of the District Court.

Praecipe of North Carolina, et al.

Petition for Appeal of North Carolina, et al.

Assignments of Errors for State of North Carolina, et al.

Order Allowing Appeal by North Carolina, et al.

Order extending time for filing record and directing Clerk to send originals.

Praecipe of Stabilization Director.

Petition for Appeal of Stabilization Director.

Assignment of Errors of Stabilization Director.

Order allowing Appeal of Stabilization Director.

Appellants' Designations of Points Intended to be Relied Upon and Appellants' designation of Parts of Record to be Printed.

Appellants stipulate that the parts of the record not printed shall have the same force and effect and may be treated for all purposes as if they were a part of the printed transcript of record.

For the State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association Inc., North Carolina Division of the Travelers Protective Association of America, and B. F. Russell.

F. C. Hillyer.

For the Economic Stabilization Director by the Price Administrator

Richard H. Field, General Counsel; David F. Cavers, Assistant General Counsel; Bernard M. Fitzgerald, Transportation Counsel, Transportation and Public Utilities Division; M. D. Miller, Chief Counsel, Common Carrier Section.

[fol. 1177] Appellees will have no counter designation to the attached appellants designation of parts of record to be

printed, a copy of which was received on the date noted below:

Appellees stipulate that the portions of the record omitted from printing shall have the same force and effect and be treated for all purposes as if they were a part of the printed transcript of record.

Oct. 21, 1944.

J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission. Charles Clark, Frank W. Gwathmey, Counsel for Appellee Railroads.

The foregoing Designation and stipulation are approved.
Charles Fahy, Solicitor General.

[fol. 1178] [File endorsement omitted.]

[fol. 1179] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

Nos. 560 & 561

ORDER NOTING PROBABLE JURISDICTION—November 13, 1944

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: Enter F. C. Hillyer. File Nos. 49,013, 49,014. Eastern North Carolina, D. C. U. S. Term No. 560. State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., et al., Appellants, vs. The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al. Term No. 561. Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, Appellants, vs. The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al. Filed October 7, 1944. Term No. 560 O. T. 1944, 561 O. T. 1944.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 7 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

653307
Sup. Ct.

No. 560

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS AND MANUFACTURERS ASSOCIATION, INC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR EASTERN DISTRICT OF NORTH CAROLINA

STATEMENT AS TO JURISDICTION

F. C. HILLYER,
J. C. B. EHRINGHAUS,
Counsel for Appellants.

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Statutes Cited.

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UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NORTH CAROLINA,
RALEIGH DIVISION

Civil Action No. 189

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MFRS. ASSOC., INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

Defendants.

JURISDICTIONAL STATEMENT BY DEFENDANT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The plaintiffs, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers & Manufacturers Association, Inc., North Carolina Division of the Travelers Protective Association of America and B. F. Russell, respectfully presents the following statement disclosing the

basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the order and decree in the above entitled cause sought to be reviewed:

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, 36 Stat. 1150, October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191; Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

B. The Statute of a State, or the Statute or Treaty of the United States, the Validity of Which Is Involved.

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved. See statement of nature of case below.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented

The order and decree sought to be reviewed was entered on July 22, 1944. The petition for appeal was presented on August 21, 1944, together with an assignment of errors.

D. Nature of Case and of Rulings Below

This is an appeal from an order and decree of the District Court of the United States for the Eastern District of North Carolina which was entered on July 22, 1944, and which denied Petitioners' (appellants) request for an interlocutory injunction to restrain and enjoin the order of the Interstate Commerce Commission requiring the passenger rail carriers operating in North Carolina to adjust their intrastate passenger coach fares to the level of interstate fares notwithstanding an order of the State Regulatory Commission declining to so do in the absence of a further showing of revenue necessity and of the true picture with respect to receipts and operating expenses in intrastate passenger rail operation in North Carolina under present conditions. The order appealed from further dismissed the petitioners action requesting a permanent injunction.

The District Court so acting was constituted under the provisions of Section 47, Title 28 U. S. C., and consisted of the Honorable John J. Parker, Circuit Judge, the Honorable I. M. Meekins and the Honorable Johnson J. Hayes, District Judges.

The application for an interlocutory injunction was based upon a petition which was filed by the State of North Carolina and the North Carolina Utilities Commission and this application and petition was later adopted by the Charlotte Shippers & Manufacturers Association, Inc., and North

Carolina Division of the Travelers Protective Association of America who intervened herein.

The petition purported to be filed in accordance with the provisions of Section 41 (28) and Sections 43 to 48 inclusive of Title 28 U. S. C. Upon petition for leave to intervene by Fred M. Vinson, Director of the Office of Economic Stabilization by Chester Bowles, Price Administrator of the Office of Price Administration, which was allowed by the District Court.

The order of the Interstate Commerce Commission against which relief was sought was entered on May 8, 1944, and corrected May 24, 1944, and its effective date fixed as August 1, 1944. It required the carriers to increase their intrastate passenger coach fares to the level of the interstate fares by said date of August 1, 1944.

The petition contained allegations that the said orders of the Interstate Commerce Commission were made without adequate findings of fact and upon findings which, in each instance challenged, had no substantial evidence in support; that the Commission had declined to hear certain evidence which would show with definiteness and certainty the operating costs of said carriers in conducting said intrastate transportation or to postpone action upon the request of the carriers to allow said increase until said facts had been shown to the State Regulatory Body; that the carriers had declined or failed to show such facts to the North Carolina Utilities Commission though requested to so do; that there was no revenue necessity for said order increasing intrastate fares but on the contrary the carriers present earnings from passenger coach travel upon interstate and intrastate was already excessively high; that there was no burden imposed by existing intrastate fares upon interstate travel; that no travelers and no localities were either burdened by or complained of said existing intrastate fares;

that interstate travelers enjoyed certain valuable privileges of travel on deluxe trains which privileges were substantial and in fact in all cases upon some lines and in almost all cases on the others denied intrastate travelers; that petitioners had been denied a full hearing before the Commission; that the Commission had denied the State's request for an investigation into the reasonableness of interstate fares under present conditions; that the Commission, in reaching its conclusions; had erroneously applied certain principles of law and had erroneously used certain legal principles which are not applicable to this controversy; that the enforcement of said increased rates will work irreparable injury and damage upon intrastate passenger travelers aggregating over $500,000 per year.

The order of the Commission here challenged and the decision of the District Court approving this order goes, as we respectfully submit, further toward depriving the State Regulatory Bodies of their power to control intrastate rates than any prior decision of this or any other Court of which we have knowledge. By its approval and paramounting of the principle of unformity, viz., identity of interstate and intrastate fares, it holds in effect that the fares fixed by the Interstate Commerce Commission shall always control and the intrastate fares fixed by the local control at a lower level shall always yield in order to obtain uniformity. It leaves no room for intrastate regulation where it differs from an interstate fare. It substantially denies to State Regulatory Agencies any lawful power to prescribe a fare which is lower than existing interstate fares even though the carriers themselves, as in this case, have previously and voluntarily established and had the Interstate Commerce Commission approve a lower fare and have, as in this instance, voluntarily increased the interstate fares from and above the intrastate level. In effect it permits the carriers

who have sought and obtained approval of a 1.5 fare to force intrastate fares above the level fixed by the State Regulatory agency and to an interstate level which said carriers have now voluntarily achieved.

E. Cases Sustaining the Supreme Court Jurisdiction of the Appeal

Florida v. *U. S.*, 282 U. S. 194, 211-212, 292 U. S. 1.
Railroad Commission of Wisconsin v. *Chicago B. & Q. R. Co.*, 257 U. S. 563.
State of New York v. *U. S.*, 257 U. S. 591.
U. S. v. *Louisiana*, 290 U. S. 70.
City of Yonkers v. *U. S.*, 64 S. Ct. 327.

F. Decree and Opinion of the District Court

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.

We therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated, August 19, 1944.

F. C. Hillyer,
J. C. B. Ehringhaus,
Attorneys for Petitioners.

APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

No. 28963[1]

ALABAMA INTRASTATE FARES

Submitted February 18, 1944. Decided March 25, 1944

Intrastate passenger fares in Alabama, Kentucky, North Carolina, and Tennessee, where lower than the corresponding interstate fares, found to cause undue advantage, preference, and prejudices as between persons in intrastate commerce on the one hand and interstate commerce on the other, and unjust discrimination against interstate commerce.

William C. Burger, Charles Clark, Joseph P. Cook, James B. Gray, Frank W. Gwathmey, Y. D. Lott, Jr., Edward D. Mohr, W. A. Northcutt, L. L. Oliver, and *Charles P. Reynolds* for respondents.

Hugh White, W. C. Harrison, Gordon Persons, J. G. Bruce, and *Norwood Johnson* for Alabama Public Service Commission; *Hubert Meredith* and *M. B. Holifield* for Commonwealth of Kentucky; *Frank L. McCarthy, Jack E. Fisher, Mrs. John W. Langley,* and *J. E. Marks* for Railroad Commission of Kentucky; *Stanley Winborne, Fred C. Hunter, R. G. Johnson, F. C. Hillyer,* and *H. M. Nicholson* for North Carolina Utilities Commission; and *Leon Jourolman, Jr.,* and *J. O. Hendley* for Railroad and Public Utilities Commission of Tennessee.

M. D. Miller, George J. Burke, David F. Cravers, Warren Price, Jr., Richard H. Field, and *Bernard M. Fitzgerald* for Price Administrator and Economic Stabilization Director.

James E. Burkett, W. R. McDonald, Crawford L. Pilcher, A. J. Young, Frank L. McCarthy, J. E. Marks, W. H.

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[1] This report also embraces No. 29000, Kentucky Intrastate Fares; No. 29036, North Carolina Intrastate Coach Fares; and 29037, Tennessee Intrastate Fares.

Amerine, F. C. Hillyer, and *Henry M. Johnson* for other interveners.

Report of the Commission

By the COMMISSION:

These proceedings were heard and briefed separately, but were orally argued together. They embody similar issues, upon which the evidence adduced in the respective proceedings is substantially similar, and will be disposed of in one report.

They are investigations instituted upon petitions by the rail carriers operating, respectively, in Alabama, Kentucky, North Carolina, and Tennessee, to determine whether the refusal of the regulatory authorities of those States to authorize or permit the application to the transportation of passengers traveling intrastate therein of fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what fares and charges, if any, or what maximum or minimum or maximum and minimum fares and charges, should be prescribed to remove such advantage, preference, prejudice, or discrimination, if any, as might be found to exist. All common carriers by railroad operating within Alabama, Kentucky, North Carolina, and Tennessee subject to our jurisdiction were made respondents, and those States were notified of these proceedings.

The regulatory commissions of the respective States intervened each in the proceeding wherein lies its chief interest; the Price Administrator in behalf of himself and the Director of Economic Stabilization intervened in all of the proceedings; and several other persons or associations of persons or corporations appeared in one or more of the proceedings to protest against any increase in fare.

History of rail fares.—In southern passenger association territory, hereinafter referred to as southern territory,

which, generally speaking, is that territory east of the Mississippi River and south of the Ohio and Potomac Rivers, the basis of one-way fares from April 1, 1908, to June 9, 1918, was generally 2.5 cents per mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, the fare was increased to 3 cents per mile in all classes of equipment. This fare remained in effect until August 25, 1920, but during the period June 10 to November 30, 1918, an additional charge of 16⅔ percent of the one-way fare was assessed for travel in sleeping and parlor cars. From August 26, 1920, to November 30, 1933, the fare generally was 3.6 cents per mile in all classes of equipment, plus a surcharge on transportation in sleeping and parlor cars on and after December 1, 1918, of 50 percent of the charge made for space occupied in such cars.

During 1932 and 1933, certain of the carriers operating in southern territory experimented with fares lower than 3.6 cents in attempts to attract additional passenger business in competition with transportation by private automobiles and in busses. For example, from April 1 to November 30, 1933, experimental one-way fares of 3 cents per mile in sleeping or parlor cars, without a surcharge, and 2 cents per mile in coaches, were maintained by the Atlanta and West Point Rail Road Company, The Western Railway of Alabama, Mobile and Ohio Rail Road Company (now part of the Gulf, Mobile and Ohio Railroad Company), Louisville and Nashville Railroad Company, and The Nashville, Chattanooga & St. Louis Railway. During the same period the Southern Railway system lines were experimenting with coach fares of 1.5 cents per mile on certain portions of their lines.

On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5-cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and the

St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees).

In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or pullman cars. The pullman surcharge was found unreasonable and its cancelation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful.

On November 15, 1937, the carriers which had been maintaining the experimental coach fare of 1.5 cents increased that fare to 2 cents per mile, but restored the 1.5-cent fare on January 15, 1939. Again, certain of the southern lines, including the Illinois Central, Mobile & Ohio, St. Louis-San Francisco, and Norfolk and Western Railway Company, retained the 2-cent fare basis.

By order of January 21, 1942, in Ex Parte No. 148, we found that a Nation-wide increase of 10 percent in fares proposed by the railroads was necessary to enable the petitioners to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise lawful. See *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 565, 566, where the foregoing findings were renewed and affirmed.

The reestablished coach fares of 1.5 cents remained in effect until February 10, 1942, on which date the 10 percent increase in fares for transportation in both coaches and pullman cars became effective. On that date fares of 1.5 cents became 1.65 cents; fares of 2 cents became 2.2 cents; and fares of 3 cents became 3.3 cents. The round-trip fares were modified to reflect the increase in the one-way fares. On various subsequent dates these increased fares also became effective on intrastate traffic in all of the States.

On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their

lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. Having found in *Passenger Fares and Surcharges, supra,* that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners, we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority, one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic. Effective on the same date the railroads generally throughout southern territory, published a uniform basis of interstate round-trip fares to displace the round-trip fares theretofore in effect, namely, in coaches on the basis of 180 percent of the one-way fare of 2.2 cents, or 1.98 cents a mile, with a return limit of 3 months; and in sleeping and parlor cars on the basis of 166⅔ percent of the one-way fare of 3.3 cents in such cars, or 2.75 cents a mile, with a return limit of 3 months. The increased fares proposed for application in southern territory were protested and suspension of their operations was requested by the Price Administrator, but we declined to suspend. The fares so increased are now in effect on interstate traffic.

Thereafter, with the approval of the rate regulatory authorities of those States, the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars were increased to the respective levels of the corresponding interstate fares in Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina, and the round-trip fares in sleeping and parlor cars were increased to the level of the interstate fares in such cars in North Carolina and Kentucky. The rate regulatory authorities of Alabama, North Carolina, Tennessee, and Kentucky have declined to authorize the increases sought by the railroads in one-way and round-trip coach fares in those States, and the rate regulatory authorities of Alabama and Tennessee have also refused to authorize the increases in the round-

trip fares in sleeping and parlor cars. It is those fares in the four States last named which are here under investigation.

As a basis for a finding of violation of section 13 (4) of the act, the interstate fares must be shown to be reasonable. *Georgia Public Service Comm.* v. *United States,* 283 U. S. 765; *United States* v. *Louisiana,* 290 U. S. 70. Therefore, before proceeding to a consideration of the evidence submitted in the respective proceedings bearing directly upon the issues under section 13 (4), we shall first consider the evidence bearing upon the reasonableness of the interstate fares.

Level of the Interstate Fares

Comparing the interstate one-way coach fare of 2.2 cents with basic fares in effect at various times during the period from April 1, 1908, to November 30, 1933, it will be seen that the fares in effect from April 1, 1908, to June 9, 1918, were 13.6 percent higher than the present fares; those in effect June 10, 1918, to August 25, 1920, were 36.4 percent higher; and those in effect August 26, 1920, to November 30, 1933, were 63.6 pereent higher. The 1.5-cent fare in effect from December 1, 1933, to November 14, 1937, and from January 15, 1939, to February 9, 1942, was a subnormal fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles.

When in *Passenger Fares and Surcharges, supra,* in 1936, we reduced the basic interstate coach fares throughout the nation from 3.6 to 2 cents, we gave consideration to the element of what the traffic will bear in the light of the competition from private automobiles (page 231), and in our summary of fact findings said (page 255):

9. Changed economic conditions, including reduced commodity prices and average income, together with the generally cheaper cost and greater convenience of travel by highway, have so affected the value of the rail passenger service to the public that a fare basis which was a reasonable maximum before severe highway competition, and especially before the fall in recent years in commodity prices and average income, is out of harmony with present-day conditions.

Economic conditions since then have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage unnecessary travel, and are cooperating with the Office of Defense Transportation in its effort to avoid the rationing of passenger travel. As hereinabove mentioned, in our order of January 21, 1942, we found that the increased fares would be reasonable, and affirmed that finding in our report of March 2, 1942. In a report on further hearing, 255 I. C. C. 357, decided April 6, 1943, wherein we suspended the operation of the increases that had been authorized on freight rates, we declined to suspend their operation on passenger fares. We there found, at pages 394-5:

Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel.

We found, further, that passenger traffic had failed for many years to pay its proper share of railway expenses, and that only with a large volume of passenger traffic was the 1942 passenger deficit currently eliminated as to most of the railroads. Respondents herein presented statistics of their revenues, expenses, and income, together with other data, designed to support that finding as to them.

The aggregate net railway operating income or deficit from passenger operations of the five principal respondents in No. 29036 for recent years was as follows:

1936, deficit	$10,997,768
1937, deficit	10,231,812
1938, deficit	12,916,499
1939, deficit	12,464,628
1940, deficit	12,548,190
1941, deficit	3,436,130
1942, income	24,630,302
Average, deficit	5,423,532

Two of these respondents [2] had a deficit from passenger operations in 1942. The freight and passenger operating ratios, respectively, of 6 of the respondents in that proceeding averaged as follows: 1936, 65 and 120; 1937, 67 and 117; 1938, 67 and 125; 1939, 64 and 124; 1940, 64 and 123; 1941, 60 and 101; and 1942, 55 and 63.

The passenger operating revenues of the five principal respondents in that proceeding during the 12 months ended October 31, 1943, were substantially greater than those for the year 1942. As estimated by witness for the Price Administrator, the passenger operating ratio of those respondents and of respondents Louisville & Nashville and Norfolk and Western Railway Company for the first 9 months of 1943, unlike that for 1942, was somewhat more favorable than the freight operating ratio of these roads for the same period. That protestant also submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before Federal income taxes more than a fair return on various book investment bases computed by his witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce.

The net railway operating income from passenger operations of the 12 principal respondents in No. 28963 is shown below:

1936, deficit	$30,134,958
1937, deficit	27,420,877
1938, deficit	32,463,299
1939, deficit	31,758,549
1940, deficit	32,933,304
1941, deficit	19,426,424
1942, income	31,566,377
Average, deficit	20,341,576

Two of these respondents [3] had a deficit in 1942. The freight and passenger operating ratios, respectively, of

[2] Carolina, Clinchfield and Ohio Railway, $84,990; Norfolk Southern Railway Company, $134,600.

[3] Atlanta, Birmingham and Coast Railroad Company, $345,762; Gulf, Mobile & Ohio, $592,468.

these 12 respondents averaged as follows: 1936, 67 and 126; 1937, 69 and 121; 1938, 68 and 128; 1939, 66 and 128; 1940, 67 and 127; 1941, 62 and 107; and 1942, 58 and 68. The passenger operating ratio of 1943 was lower than for 1942.

The aggregate net railway operating income from passenger operations of the seven principal respondents in No. 29000 was as follows:

1936, deficit	$22,763,721
1937, deficit	21,078,023
1938, deficit	24,220,376
1939, deficit	24,189,043
1940, deficit	25,748,961
1941, deficit	18,387,738
1942, income [1]	11,118,537
Average, deficit	17,895,617

The freight and passenger operating ratios, respectively, of these respondents averaged as follows: 1936, 59 and 128; 1937, 63 and 130; 1938, 62 and 131; 1939, 61 and 132; 1940, 60 and 136; 1941, 57 and 115; and 1942, 56 and 74.

The aggregate net railway operating income from passenger operations of the eight principal respondents in No. 29037 appears below:

1936, deficit	$19,290,859
1937, deficit	17,838,577
1938, deficit	19,566,771
1939, deficit	19,972,298
1940, deficit	21,587,906
1941, deficit	14,225,973
1942, income	11,802,470
Average, deficit	14,239,972

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[1] Respondents' exhibit shows a deficit for the Chesapeake & Ohio Railway Company of $1,562,533. However, the annual report of that respondent to this Commission shows a profit of $434,381.

Four of these respondents [4] had a deficit in 1942. The freight and passenger operating ratios, respectively, of eleven of the respondents in No. 29037 averaged as follows: 1936, 65 and 129; 1937, 68 and 124; 1938, 66 and 131; 1939, 65 and 132; 1940, 64 and 133; 1941, 60 and 111; and 1942, 58 and 72.

The passenger coach revenues of all class I railroads in the southern region [5] for the first 7 months of 1943 were substantially in excess of those for the corresponding months of 1942 and 1941, and the increases in the revenues from coach traffic were greater than the increases during the same period in the revenues of these railroads from sleeping and parlor car fares. So, also for the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument, the increase in the passenger coach revenues of these carriers over those for the corresponding period of 1942 was 128.5 percent, as compared with an increase of 30.2 percent in the parlor and sleeping-car revenues.

The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943. Compared with the same month in 1942, that month resulted in an increase of 0.2 percent in freight revenue and 32.8 percent in passenger revenue for the southern region and 7.4 and 27.2 percent, respectively, for the country, but in a reduction in net railway operating income from all rail operations of 61.4 percent for the southern region and 55.9 percent for the country. For the year 1943, the increase over 1942 was 13.3 percent in freight

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[4] Illinois Central, $578,425; Tennessee Central Railway Company, $84,185; Gulf, Mobile & Ohio; and Clinchfield.

[5] The boundaries of the southern region are generally the same as those of southern passenger association territory, except that the southern region does not embrace any portion of Virginia or West Virginia.

revenue and 67.9 percent in passenger revenue for the southern region and 14.1 and 60.8 percent, respectively, for the country, but the net railway operating income fell below that for 1942 by 9 and 8.3 percent, respectively. The monthly increases over the corresponding months of the preceding year in the passenger revenues of the railroads of the country, including those in the southern region, have been quite steadily declining. Thus in July 1943, that increase was 74.4 percent for the southern region and 70.4 percent for the country, and in December of that year it was 32.8 and 27.2 percent, respectively. Also, the net railway operating income has steadily declined from a deficit compared with that for the same month of the preceding year of 12.1 percent for the southern region and 9.7 percent for the country in July, to 61.4 and 55.9 percent, respectively, for December; so that, due to increased expenses and taxes, the net railway operating income of the railroads in the southern region dropped from $28,578,717 in December 1942 to $11,035,492 in December 1943.

During recent years, the principal respondents herein have expended large sums of money in remodeling and air-conditioning their passenger equipment. For example, the Southern has air-conditioned or purchased new, with air-conditioning facilities, 189 coaches. It has purchased 6 two-car Diesel units and 16 Diesel-powered locomotives for passenger-train service. The Seaboard has air-conditioned and modernized 71 coaches and 23 combination passenger and baggage cars and 33 dining cars.

Wartime operations have placed added burdens on the passenger departments and facilities of respondents and have resulted in unusual expenses, such as for safeguarding operations and providing expedited movements of troop trains. For example, during November 1943, the Southern operated 353 troop trains, and 1,178 cars with troops were operated by it in regular trains. A special representative of the railroad rides each troop train. Much deadhead movement of equipment is necessary in assembling cars for these troop movements and in returning them to the points where they will again be needed, and additional terminal switching costs are incurred. Troop movements

are given preference over all freight trains and certain passenger trains, and this occasions delays to freight and passenger trains, with resulting increased costs in wages and fuel therefor. Some of these expenses are reflected in the freight accounts of respondents. Their general offices must be kept open in some instances 24 hours a day and in others from 12 to 16 hours in order to make provision for troop movements, thus requiring the services of a greater number of employees and resulting in increased expenses. On troop movements the Government does not pay the full published fare, but is allowed a discount of 5 percent from commercial fares, except where the movement is by a route over which land-grant deductions are applicable, in which event the deduction allowed is 50 percent of the commercial fare, plus a further deduction of 3 percent. There is no land-grant mileage in North Carolina, Kentucky, or Tennessee, but there is considerable such mileage in Alabama.

The large increase in passenger traffic has made necessary a marked expansion of ticket-selling forces. Most of the through trains are operated in two sections, requiring the use of two full crews; additional ticket helpers and porters have been employed on all through trains; and at the principal passenger terminals train-dispatching platform, switching, roadway, mechanical, and equipment-repair forces have been greatly augmented. Because of the war, respondents are experiencing great difficulty in obtaining competent help.

The average hourly rate of compensation in 1942 of all employees of the principal respondents in these proceedings ranged from about 24 to 27 percent higher than in 1936. At the time of the hearings there were pending demands by the railroad operating and nonoperating unions for wage increases, including the retroactive application of certain of such increases to February 1, 1943. We may notice officially that wage increases have since been granted and are now being paid. Since we prescribed the 2-cent basic coach fare as reasonable in 1936, there has been a substantial increase in the cost of materials and supplies used by railroads in the southern region, ranging from 22 percent for iron and

steel products to 48 percent for lumber and other forest products. Also, since then the railway-tax accruals of respondents have greatly increased. For example, those of the 14 respondents in No. 28963 increased, in round figures, from $34,400,000 in 1936 to $170,500,000 in 1942, or by 395 percent. Such accruals apportioned to the passenger service of 12 of those respondents, under our formula, increased in those years by 244 percent.

On or about October 1, 1942, upon request of the Government, respondents and other railroads generally established for both interstate and intrastate travel reduced round-trip coach fares on the basis of 1.25 cents a mile, available only to personnel of the Army, Navy, Marine Corps, Coast Guard, Women's Naval Reserves, Women's Army Corps, Women's Coast Guard Reserves, and Women's Marine Corps Reserves, traveling in uniform and at their own expense when on official leave, furlough, or pass; also to nurses when not traveling in uniform, upon presentation of proper identification, and under similar conditions to personnel of the military forces of the allied nations. Respondents do not propose to increase any of those fares.

The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads of the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte No. 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943, such as inductions into the armed forces of great numbers of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movement of Army troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary.

In July 1943, the North Carolina Utilities Commission filed with us a petition for a general investigation on our

own motion of the lawfulness of the interstate coach fares to, from, and through North Carolina. That petition, together with petitions dated July 31, 1943, of the Price Administrator and August 27, 1943, of the Alabama Public Service Commission for a general investigation of the reasonableness, under present conditions, of the interstate coach fares of all of the railroads in southern territory, was denied by our order of October 11, 1943. The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10-percent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents.

The Relation of the Intrastate Fares

The intrastate fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions about to be mentioned, were on the same basis as the interstate fares for more than 34 years prior to October 1, 1942. From April 1, 1908, to June 9, 1918, the basis of the one-way intrastate and interstate fares was 2.5 cents a mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, that fare basis was increased to 3 cents and so remained until August 26, 1920. On that date, the interstate fare, and shortly thereafter the intrastate fares, became 3.6 cents in all classes of equipment, plus a surcharge for passengers traveling in sleeping and parlor cars of 50 percent of the charge for space occupied in such cars. This basis was continued until the above-mentioned

experimentation with lower fares began in 1932 and 1933, and thereafter until October 1, 1942, the intrastate fares in all four of these States were generally on the same basis as the interstate fares.

On October 1, 1942, as stated, the interstate one-way fares became 2.2 cents in coaches and continued at 3.3 cents in sleeping and parlor cars, and the round-trip fares became 180 percent of the one-way fares with a return limit of 3 months for coaches and 166⅔ percent of the one-way fares with a return limit of 3 months for parlor and sleeping cars. These are the interstate fares now in effect.

The Alabama intrastate one-way fares of respondents were, on October 1, 1942, and still are, 3.3 cents in sleeping and parlor cars and 1.65 cents in coaches, except that the Gulf, Mobile & Ohio, Illinois Central, and St. Louis-San Francisco maintain coach fares of 2.2 cents other than in instances where they meet the 1.65-cent fare of competing lines. On or about October 26, 1942, respondents in No. 28963 filed with the Alabama Public Service Commission tariffs to become effective December 1, 1942, to increase the basic one-way coach fare to 2.2 cents, making it uniform with that applicable for interstate travel, and to make effective intrastate the round-trip fares which had been established uniformly for interstate application on October 1. This proposal included cancelation of the 30-day limit round-trip fares then in effect intrastate on the basis of 2.475 cents per mile and the 6-month limit round-trip fares on the basis of 2.75 cents per mile, both good for transportation in sleeping and parlor cars; also cancellation of the 15-day limit round-trip coach fares on the basis of 1.485 cents per mile and the 60-day limit round-trip coach fares on the basis of 1.65 cents per mile. The Alabama commission suspended operation of the tariffs and after a hearing issued its report and order on January 15, 1943, canceling the suspended tariffs and denying respondents' proposal to make such fares and charges effective on intrastate traffic in Alabama.

The Kentucky intrastate one-way coach fares of respondents were on October 1, 1942, and still are, 1.65 cents, except that the Gulf, Mobile & Ohio and Illinois Central main-

tain coach fares of 2.2 cents other than in instances where they meet the 1.65-cent fare of competing lines, and the Chesapeake & Ohio maintains a fare of 2.2 cents, except on its Louisville-Winchester line. Respondents in No. 29000 filed with the Railroad Commission of Kentucky tariffs to become effective December 1, to increase the basic one-way coach fare to 2.2 cents, making it uniform with that applicable for interstate travel, and to make effective intrastate the round-trip fares which had been established uniformly for interstate application on October 1. This proposal included cancelation of the 15-day limit round-trip coach fares on the basis of 1.485 cents per mile and the 60-day limit round-trip coach fares on the basis of 1.65 cents per mile, and substitution therefor of the 3-month limit round-trip fares on the basis of 1.98 cents per mile. The Kentucky commission suspended operation of the tariffs, and after a hearing issued its report and order on May 31, 1943, denying respondents' proposal to make such one-way and round-trip coach fares and charges effective on intrastate passenger traffic in Kentucky, but approving proposed changes in round-trip fares for transportation in sleeping and parlor cars.

By petition filed October 12, 1942, with the North Carolina Utilities Commission, the several railroads operating in North Carolina, with the exception of the Norfolk & Western, sought authority to increase the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars in that State to the level of the interstate fares. The intrastate one-way and round-trip coach fares of the Norfolk & Western, which has about 100 miles of railroad in North Carolina, are the same as the interstate fares. The North Carolina commission, by report and order of July 8, 1943, approved the proposed changes in the round-trip fares in sleeping and parlor cars, but deferred decision on the proposal to increase the fares in coaches pending further administrative action by it. As a result of that order, the present intrastate one-way coach fares in North Carolina are 1.65 cents a mile; and the intrastate round-trip coach fares in that State are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days.

In Tennessee, the operation of the tariffs published by the railroads proposing to increase all lower intrastate fares in that State to the level of the corresponding interstate fares was suspended by the Railroad and Public Utilities Commision of the State of Tennessee, and by its report and order of August 30, 1943, that commission denied the railroads' proposal. As a result, the present intrastate one-way coach fares in Tennessee are 1.65 cents a mile, except that the one-way coach fares of the Illinois Central, Gulf, Mobile & Ohio, and St. Louis-San Francisco are 2.2 cents, other than in instances where they meet the 1.65-cent fare of competing lines. The intrastate round-trip coach fares are 1.485 cents a mile with a return limit of 15 days, and double the one-way fare with a return limit of 60 days. The intrastate round-trip sleeping and parlor-car fares are 2.475 cents a mile with a return limit of 30 days, and 2.75 cents a mile with a return limit of 6 months.

Section 13 (4) confers upon us the power to raise intrastate rates or fares to the reasonable interstate level upon a showing that the intrastate rates or fares cause either undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

Undue advantage, preference, or prejudice.—Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers. Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances. The differences in favor of the intrastate passengers range from 22 cents for 40 miles to $1.90 for 347 miles in coaches in each of the four States, and somewhat less in sleeping and parlor cars in Alabama and Tennessee. Thus, for example, from Columbus, Miss., to Anniston, Ala., 186 miles, the coach fare is $4.11, and from Sheffield, Ala., to Anniston, 193 miles, it is $3.30, a difference of 81 cents; from Lexington, Ky., to Columbus, Ohio, 197 miles, the fare is $4.44, as compared with a fare of $3.35 from Lexing-

ton to Owensboro, Ky., 199 miles, a difference of $1.09; from Charlotte, N. C., to Spartanburg, S. C., 75 miles, the fare is $1.65, whereas from Charlotte to Greensboro, N. C., 94 miles it is $1.55, a smaller fare intrastate by 10 cents for a greater haul by 19 miles; from Chattanooga, Tenn., to Asheville, N. C., 240 miles, the fare is $5.32, and from Chattanooga to Bristol, Tenn., 242 miles, the intrastate fare is $4.05, a difference of $1.27.

So, also, illustrations are of record showing differences between the fares over interstate and intrastate routes between points in the same State. Thus, between Piedmont, Ala., and Hurtsboro, Ala., the fare is $5.21 over the interstate route, 235.9 miles, and $4.05 over the intrastate route, 236.9 miles, a difference of $1.16. Between Memphis, Tenn., and Knoxville, Tenn., the fare over the interstate route is $9.39, and over the longer intrastate route it is $7.10, a difference of $2.29. Similar situations are exhibited with respect to the round-trip fares. They exist in each of the four States where and to the extent that the intrastate fares are on a lower basis than the interstate fares. It would serve no useful purpose to multiply such illustrations, for all are based upon the fact that the interstate fares are made on the basis of 2.2 cents per mile, while the intrastate fares are based on 1.65 cents per mile.

All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same. The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same.

Unjust discrimination.—On the basis of audits made for representative periods by the principal respondents in each of these proceedings, the estimated amount of additional revenue which the respondents in the respective States would have received during those periods if the assailed intrastate fares had been on the interstate level, projected

over the period of a year, exceeds $750,000 per annum in Alabama, $526,000 in Kentucky, $558,000 in North Carolina, and $556,000 in Tennessee.

The intrastate fares in each of the States may be used to defeat or break down the interstate fares, and thereby reduce the revenues on interstate traffic. Thus, passengers destined to points outside the respective States may now purchase intrastate tickets to points on or near the State line and either rebuy tickets or pay cash for the remainder of the journey. Technically, they break their journey when they leave the train at the points on or near the State line to purchase tickets for beyond the State, but practically they resort to a device which defeats the through fares. Typical illustrations are of record for each of the States, but one will suffice: The interstate coach fare between Raleigh, N. C., and Knoxville, Tenn., over the Southern is $8.91; the intrastate coach fare from Raleigh to Hot Springs, N. C., is $5.25, and that from Hot Springs to Knoxville is $2.05. By purchasing an intrastate ticket from Raleigh to Hot Springs and either purchasing a ticket at Hot Springs or paying cash for the remainder of the journey, a passenger traveling from Raleigh to Knoxville can thus save $1.61. So also, of course, passengers can avoid paying the higher interstate fares by using the cheaper intrastate routes between points in the same State, in instances such as those above referred to from and to which there are both interstate and intrastate routes.

Specific evidence that the intrastate fares have been and are being used to defeat or avoid payment of the interstate fares in particular instances was not submitted, and admittedly is difficult to obtain. Respondents, however, are convinced that these practices are common; that their elimination would have an important effect upon the additional revenues which they would receive if the intrastate fares were on the same level as the interstate fares; and that they can be eliminated only by establishing such a parity.

An increase in the intrastate fares to the interstate level under existing conditions, respondents insist, will not result in any important loss of traffic to other forms of transportation and will produce increased revenues substantially equivalent to those estimated by them.

Protestants' contentions and evidence—Alabama.—Protestant Alabama Public Service Commission, by three State employees, two of whom are its own field inspectors, offered evidence of the crowded condition of trains, and the large number of passengers who as a result were required to stand. From this evidence protestant argues that the persons seated must have been interstate passengers, and that intrastate passengers receive an inferior service. One of the witnesses rode in the coaches of a Louisville & Nashville train from Mobile to Montgomery, Ala., every alternate Friday night, and for the preceding 3 months had not been able to obtain a seat. It was not shown that the train had not stopped at other Alabama stations before reaching Mobile, nor that other intrastate passengers boarding the train at Mobile did not obtain seats. It may be that on this particular train more long-haul, and hence more interstate, passengers than intrastate passengers were seated on the trip from Mobile to Montgomery. But the suggestion that the service accorded to intrastate passengers generally in Alabama on interstate trains is inferior to that accorded to interstate passengers is not supported by the evidence of record.

The present intrastate fares in Alabama appear to be somewhat higher than bus fares from and to the same points. From Birmingham to 12 destinations the average rail coach fare is $1.5275, the average proposed fare is $1.9975, and the average bus fare is $1.425; from Montgomery to 8 destinations the respective average fares are $1.985, $2.616, and $1.893. While the tendency of an increase in the coach fares, without a corresponding increase in the bus fares, would be to drive traffic to the busses, the latter are already experiencing as great or greater congestion than the trains.

Protestant points out that much of the added expense of the operations of some of respondents arises in connection with or is due to the movement of troop trains, and that these are interstate movements; and it contends that civilian intrastate fares should not be increased to assist in bearing that burden. To concede the correctness of this contention might be to impair the effectiveness of the provisions of section 15a relative to adequate and efficient rail-

way service, and to defeat the national transporation policy as declared in 54 Stat. L. 899, relative to developing, coordinating, and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense, and requiring that all of the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the stated declaration of policy.

Kentucky.—Protestant Railroad Commission of Kentucky shows that the present intrastate one-way fares between representative points average 14.7 percent higher, and the proposed fares 40.7 percent higher, than the one-way bus fares from and to the same points, and the present and proposed round-trip fares average 9 and 41 percent higher than the round-trip bus fares. Differences in rail and bus fares are sometimes due to differences in distance.

Passengers traffic and revenues therefrom in Kentucky have increased in recent years, as indicated by reports of the 5 respondents in No. 29000 having approximately 96 percent of the total railroad mileage in Kentucky. Passenger revenues earned in Kentucky on intrastate and interstate traffic were $4,182,411 in 1939, $4,493,479 in 1940, $6,497,525 in 1941, and $14,023,436 in 1942. Passengers carried by the same railroads and for the same years were 2,925,085, 3,065,609, 3,931,378, and 6,633,604. Passenger-miles increased from 230,594,000 in 1939 to 723,909,000 in 1942. The average number of passengers per car-mile was 10.6 for 1939 and 22.3 for 1942. As indicating the proportion of passenger revenues accruing in Kentucky which is derived from intrastate traffic only, for the Louisville & Nashville in 1939 the total was $2,200,241 and the intrastate $519,726, while the corresponding revenues for the Chesapeake & Ohio were $682,716 and $146,987.

Turning to the system figures for the seven principal respondents, following is a comparison of 1942 and 1943, from the record as supplemented by stipulation of counsel at the argument: Freight revenues, $684,523,687 and $763,303,989; passenger revenues, $101,210,404 and $177,785,481; total operating revenues, $827,410,532 and $993,210,774; total operating expenses, $485,698,121 and $577,890,293; operat-

ing ratio, 58.7 and 58.2; and net railway operating incomes, $156,601,762 and $149,784,991.

Protestants point out that these seven respondents in the last 2 years have been able to take care of their increases in operating expenses and railway tax accruals, and still show consistent and substantial increases in their net railway operating income. The relation of net railway operating income to investment in railway property including cash, materials, and supplies, for these respondents reflects average rates of return, after Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent.

The Price Administrator, on behalf of himself and the Director of Economic Stabilization, opposes any increase in fares. He relies upon the facts that when passenger service was furnished at a loss, this Commission approved general levels of freight rates which took into consideration these passenger losses, *Fifteen Percent Case, 1937-1938,* 226 I. C. C. 41, 54; that these returns from freight traffic have been multiplied during the war by greatly increased freight traffic; and that the passenger service itself is now returning a profit. It is therefore contended that either the passenger fares or the freight rates should be reduced.

If freight traffic is now producing more than a fair return for the above-mentioned or any other reason, it may be dealt with in an appropriate proceeding. The evidence here before us does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return.

North Carolina.—In its brief and upon oral argument the North Carolina commission contends that respondents in No. 29036 erred as a matter of law, in that they failed to exhaust their remedies before that commission prior to filing their section 13 petition with us, on the ground that its order was interlocutory in form and was so issued in order that it might file with us the petition before-mentioned for investigation of the interstate coach fares. It asserts that the matter was and still is open for consideration by it. The instant proceeding was not instituted until after we had fully considered the petition of the North Carolina commis-

sion and had denied that petition. In view of this fact, and of the time which has elapsed since respondents petitioned that commission on October 12, 1942, for authority to increase the intrastate coach fares in that State, we do not believe that we would be justified in deferring action in this proceeding and requiring respondents to renew their efforts before that commission for authority to increase these fares. Moreover, the issues presented for our consideration here differ in important respects from those which are within the jurisdiction of that commission, and our duty under the Interstate Commerce Act, as we see it, is to decide these issues on the record now before us.

This protestant contends that the intrastate coach fares in that State properly should be on a lower level than the interstate fares, and that the existing disparity between these fares does not result in undue preference or prejudice, nor in unjust discrimination against interstate commerce. A similar contention is made by protestants Charlotte Shippers and Manufacturers Association and the North Carolina Division of the Travelers Protective Association of America. The position of these protestants is that the intrastate coach service in North Carolina has deteriorated and is inferior to the interstate coach service in that State. Three of the principal respondents operate a limited number of modern streamlined air-conditioned coach trains on which seats are reserved without charge in addition to the basic fare, and these trains make scheduled stops in North Carolina only at the principal cities. These protestants contrast the equipment and service afforded by those trains with the less desirable equipment and service afforded by certain local trains of some of respondents in that State. They give examples of the crowding of coaches on the latter trains far beyond their seating capacities and of the operation of such coaches in an untidy condition. The equipment and service of the streamlined coach trains is also contrasted with the service on certain branch lines of one of respondents, which is provided in each instance by mixed trains of a number of freight cars and an antiquated combination passenger-and-baggage or passenger-and-mail or express car.

Passenger traffic on most of these branch lines is light. Crowded coaches are not peculiar to intrastate travel in North Carolina, but are common also in interstate travel in that and other States in southern territory, as well as in all other sections of the country. Passengers frequently litter the cars with paper and other refuse, and thereby contribute to the untidy condition of the cars; and the crowded condition of the cars makes difficult and often impracticable the task of keeping them clean enroute. Wartime travel by railroad has resulted in such a demand for passenger coaches that every available coach is being used, and upon their arrival at the terminals, time and labor are not always sufficient to permit cleaning the coaches as thoroughly as in normal times. Admittedly, interstate as well as intrastate passengers may and do travel on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers.

The Price Administrator contends that the proposed increase in fares is inconsistent with the wartime stabilization program; further, that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if we should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares.

In *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, and in the report on further hearing in *Increased Railway Rates, Fares, and Charges, supra*, we discussed contentions that rate increases therein proposed would be inconsistent with the efforts of the Government to avoid inflation and would conflict with the provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act, and executive regulations thereunder. We concluded that the provisions of these acts, except those pertaining to the giving of notice and consent to intervene to the designated Federal agent, made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by railroad. The provisions of these acts respecting the

giving of notice and consent to intervene to the designated Federal agent have been complied with in each of these proceedings.

The evidence bearing upon the further contention of the Price Administrator has been recited hereinbefore.

Tennessee.—The Tennessee commission contends that the standards of transportation offered intrastate passengers in Tennessee do not conform, on the average, to those offered interstate passengers in that State, and that for this reason intrastate and interstate passengers in that State are not transported under substantially similar circumstances and conditions.

On each of the branch lines of respondent Nashville, Chattanooga & St. Louis, passenger service is provided by a mixed train consisting of a number of freight cars and a passenger coach, which is used also by some of the train crew in lieu of a caboose. The schedules on which such trains are operated are governed primarily by the amount of freight service to be performed. Six of these branch lines, comprising somewhat more than a third of the total mileage of this respondent in Tennessee, are wholly within that State. The coaches used on these lines are old and second grade in accommodations and maintenance. Passenger service on the main lines of this respondent, and of other respondents, is provided generally by scheduled passenger trains, including a number of modern streamlined all-coach trains or combination streamlined coach and pullman-car trains of generally first-grade accommodations and maintenance. Three streamlined all-coach trains are operated through Tennessee, each on alternate days, one over the lines of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, another over the Illinois Central, and a third over the Louisville & Nashville. These trains makes regularly scheduled stops in Tennessee, other than at Nashville, only to take on passengers destined to certain points outside of the State or to discharge passengers coming from such points. The coaches of these trains are air-conditioned, seats are reserved without charge in addition to the regular fare, and some of these trains carry lounge or observation cars which in normal times

are available to coach passengers. One combination coach and pullman-car train also makes regularly scheduled stops at only two points in Tennessee, one of such stops being limited to passengers destined to or coming from points beyond the State. The other such train makes regularly scheduled stops at a number of points in Tennessee.

Respondent Nashville, Chattanooga & St. Louis operates six passenger trains daily over its main line in each direction between Nashville and Chattanooga. One of these is the streamlined all-coach train mentioned above. Of the remaining five, one is a local train which stops at practically all intermediate points, and the other four are express trains which stop at a limited number of intermediate points and at some of them only on signal. The Nashville, Chattanooga & St. Louis and the Tennessee Central operate air-conditioned so-called chair or cafe coaches on certain of their trains between a number of points in Tennessee in which seats may be reserved at an extra charge in addition to the regular fares.

With the exception of the streamlined trains operated by certain of them, the equipment and service offered intrastate and interstate passengers in Tennessee by the other respondents and on other lines of the Nashville, Chattanooga & St. Louis in that State are not described of record.

Interstate as well as intrastate passengers may and do travel on the mixed trains described above, and the facilities and service furnished interstate passengers in such circumstances are the same as the facilities and service furnished intrastate passengers. The Nashville, Chattanooga & St. Louis also operates two interstate branch lines between certain points in Tennessee and certain points in Alabama, and passenger service on these lines is also provided by mixed trains.

The evidence contrasting the facilities and service available chiefly to interstate passengers on a limited number of modern streamlined air-conditioned coach trains with the facilities and service available to intrastate passengers on certain of the main lines of one of respondents is insufficient to establish that the standards of transportation afforded intrastate coach passengers in Tennessee, on

an average, differ materially from those afforded interstate coach passengers in that State. At best, it shows that some of the trains operated in that State are superior to others, a situation which obviously is not peculiar to Tennessee alone.

Discussion and Findings

The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in Ex Parte No. 148, wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 percent for the duration of the war, is reasonable for general application. Such a fare is now in effect for one-way application generally throughout the country, except intrastate in the four States the fares in which are here before us. Also, the respective round-trip fares for application in coaches and in sleeping and parlor cars are uniform generally throughout southern territory, except intrastate in these four States on traffic in coaches and intrastate in Alabama and Tennessee on traffic in sleeping and parlor cars.

Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States. The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin R. Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide, and is similar in every respect to that before us in *Rhode Island Commutation Fares*, 253 I. C. C. 383, and in *Increases in Texas Rates, Fares, and Charges*, *supra*.

The revenue lost to respondents in each of these States by reason of the lower intrastate fares is substantial, and the transportation conditions under which the intrastate service is performed do not differ materially from those under which the interstate service is performed. Section

13 (4) of the act empowers us to increase intrastate rates or fares so that the intrastate traffic may produce its fair share of the earnings required by the respondent carriers to enable them to provide adequate and efficient railway transportation service, both interstate and intrastate. *United States* v. *Louisiana, supra,* page 75; *Florida* v. *United States,* 292 U. S. 1; *Illinois Commerce Comm.* v. *United States,* 292 U. S. 474. "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried • • • under substantially the same conditions." *Illinois Commerce Comm.* v. *United States, supra,* page 485.

We find that——

1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from, and through those respective States on the other, are substantially similar.

4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intra-

state passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service.

6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State.

The foregoing findings are without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act.

In accordance with our practice in such proceedings, we shall leave to respondents and the respective State commissions the matter of adjusting the intrastate fares to conform to these findings. If this is not accomplished within 30 days from the service of this report, consideration will be given to the entry of an appropriate order.

SPLAWN, *Commissioner*, dissenting:

In my judgment the decision of the majority on the evidence in these proceedings goes beyond our lawful power under section 13 (4). This view, I think, finds full support in several decisions by the Supreme Court of the United States in which the Court has had occasion to review some of our reports and orders under that section.

It should be emphasized that our authority under section 13 (4) to require increases in intrastate rates springs from and is an incident of the duty to regulate and protect interstate commerce. In exercising that power to nullify State authority we should be guided by the following wise and well-settled principles or standards which have been announced by the Supreme Court: (1) That this Commission has no general authority to regulate intrastate rates; (2) that the provision of section 13 (4) prohibiting unjust discrimination against interstate commerce is to be considered in connection with section 15a; (3) that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear; and (4) that the mere existence of a disparity between rates on intrastate and interstate traffic does not warrant our prescribing, intrastate rates. *Florida* v. *United States*, 282 U. S. 194, 211-212.

These proceedings present two questions. First, do the intrastate passenger fares imposed by authority of these States cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand? And second, do the intrastate fares cause any undue, unreasonable, or unjust discrimination against interstate commerce?

In considering the first question it is important to observe that the prohibition against undue prejudice and preference as between persons and localities in interstate and intrastate commerce in section 13 (4) is substantially the same as the prohibition against undue prejudice and preference contained in section 3 (1). The principal difference between the two provisions is that section 3 (1) prohibits a *carrier* from giving an undue preference or causing an undue prejudice, while section 13 (4) prohibts any intrastate *rate, fare,* et cetera from causing the undue preference or undue prejudice. In view of the similarity of the language employed in the two provisions, we have said that evidence to sustain an order and finding that intrastate rates are violative of section 13 (4) in that they unduly prejudice persons or localities must be of equal dignity and probative value as the evidence required to sustain a finding under section 3 (1). *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 334. The soundness of that rule is evident, for both provisions are directed against the same evils, namely, undue prejudice and undue preference as between localities and persons.

We have frequently found that the mere existence of a disparity in rates does not warrant a finding of undue prejudice and preference under section 3 (1), and that ordinarily the evidence to support such a finding must establish that such prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another. To say that the evidence necessary to sustain a violation of the provision of section 13 (4) as to undue prejudice and preference as between localities and persons, can be of less dignity or less probative value than the evidence necessary to show a violation of section 3 (1) ignores completely the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear.

In support of their contention that the intrastate fares now maintained in these States cause undue prejudice and preference as between persons and localities, respondents rely upon (1) the similarity of the intrastate and interstate services, and (2) the differences in the fares.

The provision of section 13 (4) which deals with prejudice and preference as between persons and localities, as previously noted, corresponds to section 3 (1). Both of these provisions obviously are for the protection of persons and localities, and not primarily for the benefit of the carriers. The second provision of section 13 (4), which is discussed later herein, provides a complete remedy for the carriers in situations where intrastate rates, fares, et cetera, unlawfully discriminate against interstate commerce.

With respect to the situations in Kentucky and Alabama, for example, no persons who pay the higher interstate fares and no localities are appearing herein to complain of undue prejudice and preference, or without complaining, have testified that they are in any wise injured, and so far as these records disclose, none has complained to respondents. Under these circumstances we would not even have before us a complaint under section 3 (1), much less the evidence on which to base a finding of a violation of that section. Respondents do not ask relief for any particular persons or places, but seek State-wide orders.

In *Railroad Comm. of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, and *State of New York* v. *United States*, 257 U. S. 591, the Court held that orders entered by this Commission under section 13 (4) requiring horizontal increases of intrastate passenger fares throughout the States of Wisconsin and New York, to correspond with fares for like interstate service in the same States, could not be sustained as orders to remove undue prejudice and preference as between persons and localities. In the *Wisconsin case*, at page 580, in referring to the "sweep" of our order the Court said:

> It includes fares between all interior points although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, can not give the

order validity. As said by this court in the *Illinois Central R. R. case*, [245 U. S. 493]: "It is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." See also *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627.

In this report it is stated that "The evidence in each of these proceedings, therefore, contrary to the situation dealt with in [the *Wisconsin case*], establishes a condition which is State-wide." "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States." Is it to be supposed that interstate passengers did not likewise ride on all trains to and from all branch and mainline points in Wisconsin? The cases are distinguishable, but in the following respect: In the *Wisconsin case* there was evidence that localities in Minnesota and Michigan in close proximity to localities in Wisconsin competed for the location of industries, and for retail trade, and to some extent for wholesale trade. This competition was affected by the lower State fares. In these cases there is no evidence whatever of competition or injury. The Court found that there was evidence which would support a finding of undue prejudice and preference against a large class of fares. As above indicated, objection to the Commission's order was that it was not restricted to the border points to which the evidence pertained, but that it included fares between all interior points although they might not be near the border and the fares between them might not work a discrimination against interstate travelers at all. To assume that the court supposed that interstate passengers did not travel to and from the interior points, and to attempt to distinguish the cases upon that ground, is to miss the real point of distinction, which is that in the *Wisconsin case* there was evidence going beyond a mere showing of a difference in rates for similar services, and which tended to show injury to interstate localities, while the records herein are devoid of evidence of injury.

If the order of the Commission there could not be sustained as an order to remove undue prejudice and preference as between persons and localities, what can be said in support of that phase of the State-wide orders herein which are unsupported by evidence beyond the mere difference in fares?

Turning now to the second question: Do the intrastate fares cause undue or unjust discrimination against interstate commerce? Here, respondents rely upon the loss of revenues which they contend has resulted from refusal of the State rate authorities to permit the intrastate fares to be increased to the interstate level. In Kentucky, for example, the estimated annual loss of revenue to all of the principal respondents in that State approximates $526,000.

Section 15a, which is intended, among other things, to insure a fair return for carriers provides that in the exercise of our power to prescribe just and reasonable rates we shall give due consideration, among other factors, to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. In the *Wisconsin case,* at page 586, the Court referred to the "dovetail relation" between the provision of section 13 (4) relating to unjust discrimination against interstate commerce and the purpose of section 15a, as it then stood, and pointed out that if that purpose is *interfered with* by a disparity of intrastate rates we are authorized to end the disparity by directly removing it. Continuing, at page 590 the Court stated that action by the Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce. It should be noted that at the time of the decision in the *Wisconsin case,* section 15a did not read the same as at present, but its general purpose was to secure to the carriers revenue sufficient to enable them to provide in the public interest adequate and efficient transportation service, the same as under the present provisions.

That something more than a disparity between interstate and intrastate rates is necessary to support a finding of

undue discrimination against interstate commerce is made quite plain in *United States* v. *Louisiana*, 290 U. S. 70, 74, 75, wherein the Court stated:

> By section 416 of the Transportation Act, section 13 (4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This Court has consistently held that this section is to be construed in the light of section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. So construed, section 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *Wisconsin Railroad Comm'n* v. *C. B. & Q. R. Co. supra*, 586, 587, 588, 589, 590; *New York* v. *United States*, 257 U. S. 591, 601; *Florida* v. *United States, supra*, 211; *Louisiana* v. *United States*, 284 U. S. 125, 131; see *Nashville, C. & St. L. Ry. Co.* v. *Tennessee*, 262 U. S. 318.

In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive the additional revenue, which would result from increasing the present intrastate fares to the interstate level, operates to *interfere with* or to *thwart* the broad purpose of section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce.

In the Kentucky proceeding, for example, the relation of net railway operating income to investment in railway property including cash, materials, and supplies, for the seven principal respondents shows average rates of return,

after deduction of Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; 1942, 5.78 percent. In this connection it is of interest that based on 1940 valuations recommended by our Bureau of Valuation the average rates of return for the respective years indicated would be 4.18 percent, 5.31 percent, 5.57 percent, 7.81 percent, 8.50 percent, and 8.13 percent. The increase in net railway operating income for passenger traffic alone, 1942 over 1941, was $50,992,801 for the 12 class I respondents in the Alabama proceeding, and $29,506,275 for the 7 principal respondents in the Kentucky proceeding.

I wish to emphasize my disagreement with finding 5 in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues *required* to enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by section 15a.

In each of these four States the State regulatory authority, after due consideration, authorized an increase of 10 percent on the going intrastate fares and declined to order or authorized a further increase to the interstate level. The fact that some of the adjoining States have permitted increases in intrastate fares to the interstate level is not binding upon the duly constituted authorities of these four States. The evidence in these proceedings does not sustain the contention that the maximum fares for interstate travel must also be the minimum fares for intrastate travel.

I am authorized to say that Commissioners Aitchison and Mahaffie join in this expression.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MANUFACTURERS ASSOCIATION, INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Plaintiffs.*

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMISSION, *Defendants*

DECREE

This cause coming on to be heard before the Undersigned, constituting a special District Court of Three Judges convened pursuant to 28 U. S. C. A. 47, upon an application for an interlocutory injunction; and being heard upon the evidence taken before the Interstate Commerce Commission and the Report of the Commission, as well as upon the arguments and briefs of counsel; and the cause, by consent of the parties, having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the Court herewith filed, it is ordered, adjudged and decreed that the injunction and other relief

prayed for in the complaint be denied and that the suit be dismissed.

This the 20th day of July, 1944.

(S.) JOHN J. PARKER,
United States Circuit Judge, Fourth Circuit.
I. M. MEEKINS,
United States District Judge,
Eastern District of North Carolina.
JOHNSON J. HAYES,
United States District Judge,
Middle District of North Carolina.

APPENDIX "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MANUFACTURERS ASSOCIATION, INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Plaintiffs.*

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

The Court makes the following findings of fact:

1. The Interstate Commerce Commission on March 25, 1944 filed its report and order, 258 I. C. C. 133, modified by order of May 8, 1944, requiring railroads serving the

State of North Carolina to establish and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

2. The effect of the order is to require the present basic coach fare in North Carolina of 1.65 cents per mile to be increased to the present interstate level of 2.2 cents per mile.

3. The Commission found the interstate coach passenger fares prevailing in North Carolina to be just and reasonable and this finding is supported by substantial evidence.

4. The Commission found that the conditions affecting interstate and intrastate transportation in the State of North Carolina were substantially similar and that the disparity between interstate and intrastate coach fares constituted discrimination in favor of intrastate passengers and against interstate passengers using the same facilities; and these findings are supported by substantial evidence.

5. The Commission found that the revenues of rail carriers in North Carolina are less by $525,000.00 per annum than they would be if intrastate fares were increased to the interstate level and that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable the rail carriers to render adequate and efficient transporation service; and this finding is supported by substantial evidence.

6. The Commission found that the maintenance of the lower intrastate coach fares in North Carolina causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce; and that this unlawfulness should be removed by increasing intrastate fares to the level of interstate fares.

7. The Commission afforded full and fair hearing to plaintiffs and accorded to the Price Administrator full opportunity to be heard and present contentions under the Stabilization Act.

8. The Commission filed a report, 258 I. C. C. 133, setting forth its findings and analyzing the evidence in support thereof; and the basic findings as well as the ultimate findings therein contained are supported by substantial evidence.

CONCLUSIONS OF LAW

And the Court sets forth the following as its conclusions of Law:

1. The findings and order of the Commission are based on substantial evidence, do not involve any error of law and are not arbitrary or unreasonable.

2. The Commission properly required that railroads serving the State of North Carolina established and maintain intrastate coach fares for passengers on bases no lower than the present interstate fares.

3. Injunction should be denied and the suit should be dismissed.

(S.) JOHN J. PARKER,
United States Circuit Judge, Fourth Circuit.
I. M. MEEKINS,
United States District Judge,
Eastern District of North Carolina.
JOHNSON J. HAYES,
United States District Judge,
Middle District of North Carolina.

APPENDIX "D"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

No. 189. Civil

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, CHARLOTTE SHIPPERS & MANUFACTURERS ASSOCIATION, INC., NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Plaintiffs*,

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

ON APPLICATION FOR INJUNCTION

Argued July 12, 1944 Decided

Before Parker, Circuit Judge, and Meekins and Hayes, District Judges

J. C. B. Ehringhaus and F. C. Hillyer for State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., and North Carolina Division of the Travelers Protective Association of America; Richard H. Field, General Counsel, David F. Cavers, Assistant General Counsel, Bernard M. Fitzgerald, Transporation Counsel, Transporation and Public Utilities Division, and M. D. Miller, Attorney, Office of Price Administration, for Price Administrator; Charles Clark, General Attorney Southern Railway System, Frank W. Gwathmey and Joseph P. Cook for North Carolina Rail Lines; Leon Jourolmon, Jr., for Railroad & Public Utilities Commission of State of Tennessee; for Alabama Public Service Commission; and for Commonwealth of Kentucky. Edward Dumbauld, Special Assistant to the Attorney General, Wen-

dell Berge, Assistant Attorney General, J. O. Carr, United States Attorney, Daniel J. Knowlton, Chief Counsel and J. Stanley Payne, Assistant Chief Counsel Interstate Commerce Commission, for United States and Interstate Commerce Commission.

PARKER, *Circuit Judge*:

This is a suit under the Urgent Deficiencies Act (28 U. S. C. A. 43-48) to enjoin and set aside an order of the Interstate Commerce Commission requiring railroads serving the State of North Carolina to establish and maintain intrastate coach fares for passengers on buses no lower than the present interstate fares. The effect of the order is to require the present basic coach fare in North Carolina of 1.65 cents per mile to be increased to the present interstate level of 2.2 cents per mile. A special court of three judges has been convened pursuant to statute, intervention has been allowed on the part of various interested parties, and the case has been heard on the merits and submitted for final decree.

The findings of the Commission in support of the order, made in a proceeding relating to fares in the States of Alabama, Kentucky and Tennessee, as well as in North Carolina (Alabama Intrastate Fares 258 I. C. C. 133, 154-155), are as follows:

> "1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fare applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.
>
> "2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the coresponding fares applicable interstate and intrastate generally

throughout southern territory, except in the several States mentioned in this finding.

"3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from and through those respective States on the other, are substantially similar.

"4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers, and the undue and unreasonable disadvantage and prejudice of the interstate passengers.

"5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of revenues required to enable respondents to render adequate and efficient transportation service.

"6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee; and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid inter-

state fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from, and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State.

These ultimate findings of the Commission are supported by a detail discussion of the evidence before it, which need not be reported here, and by a review of the history of passenger rates since 1908, which because of its importance with relation to the fundamental questions here involved we quote as follows:

"In southern passenger association territory, hereinafter referred to as southern territory, which generally speaking, is that territory east of the Mississippi River and south of the Ohio and Potomac Rivers, the basis of one-way fares from April 1, 1908, to June 9, 1918, was generally 2.5 cents per mile in all classes of equipment. On June 10, 1918, under an order of the Director General of Railroads, the fare was increased to 3 cents per mile in all classes of equipment. This fare remained in effect until August 25, 1920, but during the period June 10 to November 30, 1918, an additional charge of 16⅔ per cent of the one-way fare was assessed for travel in sleeping and parlor cars. From August 26, 1920, to November 30, 1933, the fare generally was 3.6 cents per mile in all classes of equipment, plus a surcharge on transportation in sleeping and parlor cars on and after December 1, 1918, of 50 per cent of the charge made for space occupied in such cars.

"During 1932 and 1933, certain of the carriers operating in Southern territory experimented with fares lower than 3.6 cents in attempts to attract additional passenger business in competition with transportation by private automobiles and in buses. For example,

from April 1 to November 30, 1933, experimental one-way fares of 3 cents per mile in sleeping or parlor cars, without a surcharge, and 2 cents per mile in coaches, were maintained by the Atlanta and West Point Railroad Company, The Western Railway of Alabama, Mobile and Ohio Rail Road Company (Now part of the Gulf, Mobile and Ohio Railroad Company). Louisville and Nashville Railroad Company, and The Nashville, Chatttanooga & St. Louis Railway. During the same period the Southern Railway system lines were experimenting with coach fares of 1.5 cents per mile on certain portions of their lines.

"On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5 cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and the St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees.)

"In Passenger Fares and Surcharges, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches, or pullman cars. The pullman surcharge was found unreasonable and its cancellation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful.

"On November 15, 1937, the carriers which had been maintaining the experimental coach fare of 1.5 cents increased that fare to 2 cents per mile, but restored the

1.5 cent fare on January 15, 1939. Again, certain of the southern lines, including the Illinois Central, Mobile and Ohio, St. Louis-San Francisco, and Norfolk and Western Railway Company, retained the 2-cent fare basis.

"By order of January 21, 1942, in Ex Parte No. 148, we found that a nation-wide increase of 10 per cent in fares proposed by the railroads was necessary to enable the petitioners to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise unlawful. See Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545, 565, 566, where the foregoing findings were renewed and affirmed.

"The reestablished coach fares of 1.5 cents remained in effect until February 10, 1942, on which date the 10 per cent increase in fares for transportation in both coaches and Pullman cars became effective. On that date fares of 1.5 cents became 1.65 cents; fares of 2 cents became 2.2 cents; and fares of 3 cents became 3.3 cents. The round-trip fares were modified to reflect the increase in the one-way fares. On various subsequent dates these increased fares also became effective on intrastate traffic in all of the States.

"On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. Having found in Passenger Fares and Surcharges, supra, that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners, we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 per cent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority,

one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic. Effective on the same date the railroads generally throughout southern territory, published a uniform basis of interstate round-trip fares to displace the round-trip fares theretofore in effect, namely, in coaches on the basis of 180 per cent of the one-way fare of 2.2 cents, or 1.98 cents a mile, with a return limit of 3 months; and in sleeping and parlor cars on the basis of 166 2/3 per cent of the one-way fare of 3.3 cents in such cars, or 2.75 cents a mile, with a return limit of 3 months. The increased fares proposed for application in southern territory were protested and suspension of their operations was requested by the Price Administrator, but we declined to suspend. The fares so increased are now in effect on interstate traffic.

"Thereafter, with the approval of the rate regulatory authorities of those States, the intrastate one-way and round-trip coach fares and the round-trip fares in sleeping and parlor cars were increased to the respective levels of the corresponding interstate fares in Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina, and the round-trip fares in sleeping and parlor cars were increased to the level of the interstate fares in such cars in North Carolina and Kentucky. The rate regulatory authorities of Alabama, North Carolina, Tennessee, and Kentucky have declined to authorize the increases sought by the railroads in one-way and round-trip coach fares in those states, and the rate regulatory authorities of Alabama and Tennessee have also refused to authorize the increases in the round-trip fares in sleeping and parlor cars. It is those fares in the four States last named which are hereunder investigation."

With respect to the reasonableness of the basic interstate coach fare of 2.2 cents, the Commission pointed out that from 1936 to the date of its order the five principal carriers operating in the State of North Carolina had shown a deficit from passenger operations for every year except the

war year 1942. Referring to an application by the North Carolina Utilities Commission for a further investigation as to the reasonableness of interstate fares, after the entry of its order raising the interstate fares in southern territory to the level prevailing elsewhere, the Commission said:

> "The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than the maximum basic fares found reasonable in Passenger Fares and Surcharges, supra, plus the 10 per cent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents."

With respect to discrimination against interstate passengers, the Commission said: "All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same." And in replying to a contention that the intrastate coach service in North Carolina has deteriorated and is inferior to that provided for interstate traffic, the Commission said: "Admittedly, interstate as well as intrastate passengers may and do travel on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers."

With respect to the discrimination caused by these lower intrastate fares against the interstate commerce of the

carriers, in that under the intrastate rates the intrastate passenger service was not contributing its fair share of the revenues required to maintain an adequate and efficient transportation service, the Commission said:

> "On the basis of audits made for representative periods by the principal respondents in each of these proceedings, the estimated amount of additional revenue which the respondents in the respective States would have received during those periods if the assailed intrastate fares had been on the interstate level, projected over the period of a year, exceeds $750,000 per annum in Alabama, $526,000 in Kentucky, $558,000 in North Carolina, and $556,000 in Tennessee."

Although many matters have been referred to in the pleadings and arguments, the case before us resolves itself into four questions: (1) Did the Commission have power to require that intrastate fares be raised to the level of reasonable interstate fares so as to eliminate discrimination against passengers in intrastate commerce and discrimination against the interstate business of the carriers? (2) Did the Commission's finding that the interstate fares were reasonable have adequate support in the record? (3) Did the Commission's findings as to discrimination against interstate passengers and the interstate commerce of the carriers have adequate support in the record? and (4) Was adequate consideration given by the Commission to the requirements of the National Stabilization Act? We think that all of those questions must be answered in the affirmative and shall discuss them in the order named.

The Power of the Commission.

Paragraph (3) of section 13 of the Interstate Commerce Act as amended, 49 U. S. C. A. 13(3), clothes the Commission with power, in any proceeding instituted under the Transportation Act, to investigate any rate, fare, etc. made or imposed by the authority of any state. Paragraph (4) of that section authorized the Commission to prescribe rates, fares etc. to remove undue, unreasonable or unjust discriminations found to exist against persons and localities or

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against interstate or foreign commerce as a result of intrastate rates or fares. That paragraph is as follows:

> "Sec. 13, Par. (4) Duty of Commission where State regulations result in discrimination. Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner, as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Under this provision, it is the duty of the Commission not merely to remove discriminations against persons and localities but to remove unjust discrimination against interstate commerce resulting from unreasonable intrastate rates. Under 15a (2) of the Interstate Commerce Act, 49 U. S. C. A. 15A (2), it is the duty of the Commission, in prescribing rates, to give due consideration to the effect thereof on the movement of traffic and on the principal objective of the act, which is to provide for the country an adequate and efficient railway transportation service. The power granted by 13(4) is to be construed along with the duty imposed by 15a(2). As said by Chief Justice Taft in Wisconsin R. R. Com'n *v.* Chicago, Burlington & Quincy Railroad Co., 257 U. S. 563, 585-586:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate

national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railway are to earn a fixed net percentage of income, the lower the intrastate rates the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, sec. 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of sec. 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

To the same effect is what is said by Chief Justice Hughes and Chief Justice Stone in the more recent cases of United States *v.* Louisiana, 290 U. S. 70; Florida *v.* United States, 292 U. S. 1; and Illinois Commerce Com'n *v.* United States, 292 U. S. 474. In the case last cited Chief Justice Stone said:

"The scope and application of sec. 13(4) have so recently been fully considered in opinions of this Court

in United States *v.* Louisiana, 290 U. S. 70; Florida *v.* United States, ante, p. 1; See also Georgia Public Service Commn. *v.* United States, 283 U. S. 765; Florida *v.* United States, 282 U. S. 194; that it is unnecessary to repeat that discussion here. Under Sec. 13(4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service."

The philosophy underlying the granting of such power to the Commission was well put by Chief Justice Taft in the Wisconsin case, supra, as follows:

"• • • such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unity and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso [of the Interstate Commerce Act].

• • • • • • •

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the

work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. Wilson *v.* Shaw, 204 U. S. 24; Luxton *v.* North River Bridge Co., 153 U. S. 525; California v. Central Pacific R. R. Co., 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

In the light of these authorities, there is no force in the argument that the power exercised by the Commission was a violation of the rights of the states reserved by the 10th Amendment or in the suggestion that the duty rests upon this court to hear the case de novo for the purpose of ascertaining whether states rights have been violated. As was well said by Chief Justice Hughes in Florida *v.* United States, supra, 292 U. S. 1, 12:

"The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by sec. 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate

body. Shreveport Case, 234 U. S. 342, 351, 354, 355; Railroad Commission of Wisconsin *v.* Chicago, B. & Q. R. Co., supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. United States *v.* Louisville & Nashville R. Co., 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission."

The Reasonableness of the Interstate Fares.

The Commission was fully aware that it had no power to order intrastate fares raised to the level of interstate fares without first finding that the interstate fares were reasonable. It so stated in its report, citing the decisions of the Supreme Court to that effect in Georgia Public Service Commission *v.* United States, 283 U. S. 765, and United States *v.* Louisiana, 290 U. S. 70. As a basis of its order, therefore, it made not only the general finding quoted above, but also the specific findings as to revenues from passenger business since 1936, which we have mentioned, referred to the increased costs of doing business and gave the history of passenger fares in the United States which we have quoted. In the light of all of these, we think there can be no question but that the finding of the reasonableness of interstate fares is adequately supported. It is perfectly clear that the reasonableness of such fares is not to be determined solely on the basis of transient war conditions, or upon the unusual passenger revenues due to such conditions, or upon a consideration of the passenger business disassociated from the other business of the carriers.

On the contrary, the Commission, in discharging its duty to fix just and reasonable rates and fares which will secure for the country an adequate and efficient transportation system, must view the system as a whole and must judge the future in the light of the past as well as of the present. The rate structure has had an historical development, which may not be ignored in dealing with the question of the reasonableness of particular rates or fares.

Until the year 1942 the passenger business of the railroads had for a number of years been a continuing source of loss to them notwithstanding the high fares that prevailed prior to the order of 1936. That order was made reducing coach fares generally to 2 cents per mile, not because there were excessive revenues from passenger business warranting the reduction, but because it was thought that, in view of prevailing conditions, that fare would produce greater revenue than the higher fares and would more nearly approximate a just fare in view of what the service rendered was reasonably worth. At the same time, southern carriers were allowed to put into effect the experimental 1.5 cents coach fare, in an effort to recover some of the passenger business that they had lost and to increase the revenues of a branch of the business that showed a constant and increasing deficit. At that time the question of the reasonableness of passenger fares was thoroughly examined from every angle. See Passenger Fares and Surcharges 214 I. C. C. 174.

The reasonableness of passenger fares was again submitted to a searching inquiry by the Commission in its report of March 2, 1942, in Ex Parte No. 148, wherein, following certain wage increases and a showing of other increased costs, it approved an increase of 10 percent in passenger fares and a smaller proportionate increase of freight rates. In granting the increase, the Commission said (248 I. C. C. 545, 565): "Because of the abnormal conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute toward meeting the added operating costs of the railroads." The reasonableness of

the general level of passenger fares was again considered in connection with Ex Parte 148, in the Commission's report of April 6, 1943, in which, while suspending the freight rate increases, it declined to suspend the increase in passenger fares. 255 I. C. C. 357. The Commission said (pp. 394-395): "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight. • • • We find no modification of our previous findings, orders, and authorizations respecting the present interstate standard passenger fares is necessary." The matter was again dealt with by the Commission in its supplemental report of November 8, 1943, 256 I. C. C. 502.

The order of the Commission permitting the Southern carriers to abandon the experimental coach fare of 1.5 cents per mile, and to raise their interstate coach fare to the standard coach fare of 2.2 cents per mile, was entered on August 1, 1942; and the order in Ex Parte No. 148 was modified accordingly. The increase was made, therefore, in the course of proceedings in which the general level of passenger fares was thoroughly investigated and the facts justifying the fares established were fully found. These findings were before the Commission in the proceedings to raise intrastate fares and were properly considered along with the other evidence adduced. Without regard to the other evidence, they fully justified the findings of the Commission as to the reasonableness of the interstate fares. An examination of the record shows, however, that ample evidence was introduced to support the findings that the interstate fares were reasonable. The Commission gave due consideration to the evidence as to increase in passenger traffic

and revenues since the beginning of the war is shown by the following passage from its report, p. 142:

> "The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads of the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte No. 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943; such as inductions into the armed forces of great number of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movement of Army Troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary."

The argument is made that, having approved a fare of 1.5 cents in a period of depression when the railroads were losing money on their passenger business, the Commission cannot, except by arbitrary action, now approve a fare of 2.2 cents, in a time of prosperity when the passenger business has increased until it is a source of unexpected profit. The answer, of course, is that the low fare was allowed as an experiment in an effort to recapture lost passenger business. With the increase of passenger business, the necessity for the low fare to attract business has passed, and the fare can now be fixed without reference to that consideration. It is elementary that, a reasonable basis being shown, the fixing of a rate or fare is a matter for the Commission and not for the courts, and that the courts, on review of an order of the Commission, may not substitute their judgment for that of the Commission as to its reasonableness. Florida v. United States, supra, 292 U. S. 1, 12; Union Pac. R. Co. v. United States, 222 U. S. 541, 547.

It is argued, also, that it was incumbent upon the Commission, in condemning intrastate fares as discriminatory, to determine the reasonableness of interstate fares in the light of existing conditions and not of conditions that existed in former years; but it is clear that the Commission has had existing conditions in mind in finding the interstate fares to be reasonable. It is well settled that ordinarily the experience of a single year is an unsafe guide in fixing rates. United Gas Public Service Co. v. Texas, 303 U. S. 123, 145; West Ohio Gas Co. v. Public Utilities Com., 294 U. S. 79, 81. Particularly is this true when the single year is a war year and the conditions are abnormal. What weight shall be accorded a temporary increase of business due to war conditions is manifestly a matter for the Commission and not for the courts.

There is no force whatever in the argument that the finding as to reasonableness of interstate fares was made without notice and hearing. As indicated above the findings upon which interstate passenger fares were fixed and upon which the 10 percent increase was allowed (the abandonment of the experimental coach fare being permitted in connection with the latter) were made after the fullest hearing and investigation, with two hearings on petitions of the Price Administrator as to whether the increases in rates and fares should not be suspended in the interest of price stabilization. In addition to these, consideration was given by the Commission to the evidence adduced on the hearing on intrastate fares. It is true that the North Carolina Commission in July 1943 filed with the Interstate Commission a petition asking the latter for a general investigation on its own motion of the reasonableness of interstate coach fares to, from and through North Carolina, and that the Interstate Commission refused to take action on the petition; but the Commission referred to the petition in the report accompanying the order here complained of and stated that the record did not warrant any modification of its conclusions in Ex Parte No. 148. Whether the Commission, having so recently and so fully considered the reasonableness of interstate fares would again go into the question was a matter well within its discretion. I. C. C. v. Jersey City, — U. S. — 64 S. Ct. 1129, 1135; Illinois Com. Com. v. United

States, 292 U. S. 474, 480. As was said by the Supreme Court in the Jersey City case:

"Only once in the history of administrative law has this court reversed a Commission for refusing to grant a rehearing on the contention that the record was 'stale.' * * * The Court, however, promptly restricted that decision to its special facts, United States v. Northern Pacific R., 288 U. S. 490, 53 S. Ct. 406, 77 L. Ed. 914, and it stands virtually alone. In Baltimore & Ohio R. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 817, 80 L. Ed. 1209, Mr. Justice Brandeis, concurring, said, 'The Atchison case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing.' * * *

"This Court has held that the Interstate Commerce Commission did not abuse its discretion in refusing a request for a new study as a basis for rate-making, although changes were alleged consisting of a falling off in volume of traffic, improvement of highways in the District resulting in diversion of traffic from rail to truck, decline in value of the articles transported, reduction in wages and cost of supplies, and curtailment of the amount of service rendered, and where the Commission decided that it was able on the record before it to consider the affect of the factors suggested by the appellants and that a new cost study was unnecessary. Illinois Commerce Commission v. United States, 292 U. S. 474, 480, 54 S. Ct. 783, 785, 78 L. Ed. 1371. Except that the trends are in an opposite direction, the inquiry demanded here is of the same nature. See also Georgia Public Service Commission v. United States, 283 U. S. 765, 769, 770, 51 S. Ct. 619, 620, 621, 75 L. Ed. 1397.

* * * * * * *

"The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. United States ex rel.

Maine Potato Growers & Shippers Ass'n. v. Interstate Commerce Commission, 66 App. D. C. 398, 88 F. 2d 780, 784, certiorari denied 300 U. S. 684, 57 S. Ct. 754, 81 L. Ed. 886; Mississippi Valley Barge Line Co. v. United States, D. C., 4 F. Supp. 745, 748; Union Stock Yards v. United States, D. C., 9 F. Supp. 864, 873; American Commission Co. v. United States, D. C., 11 F. Supp. 965, 972; R. C. A. Communications, Inc., v. United States, D. C., 43 F. Supp. 851, 858."

The North Carolina Commission could not demand that the Interstate Commission make a new and independent investigation as a prerequisite to its order raising intrastate fares. That order was but a step in the process of adjusting the rate structure of the nation and was properly predicated upon the findings, as to intrastate fares already made. The matter was well put by the Supreme Court in the *Jersey City* case, supra, as follows:

"Nor can a litigant insist that a commission may not take a second step in a rate-making process without retracing all previous ones. As put by the Chief Justice: 'The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details.' Such procedure may be adopted where it is appropriate to carry out the provisions of an act. Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 584, 62 S. Ct. 736, 742, 86 L. Ed. 1037."

Answering a somewhat similar contention in Illinois Com. Com. v. United States, supra, and denying that the Commission was required to make a further cost study based on alleged changed conditions, the Supreme Court said:

"Whether or not the cost study was representative, whether the study should have been more refined, and

whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts."

Plaintiffs contend that the reasonableness of intrastate fares was excluded from consideration at the hearing by a statement of the Examiner. There is no merit in the contention. At the beginning of the hearing, counsel for North Carolina stated that it was his understanding that the reasonableness of interstate fares was not in issue and the Examiner responded: "Well, it is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise, it is not in issue. It is not subject to attack, and the parties are at liberty to show what facts they have and they [their] position on that particular question." No objection was voiced to the Examiner's statement and the question as to the reasonableness of the interstate fares was fully considered by the Commission. As indicated above, we think that the Commission would have been acting reasonably and within its powers, if it had treated the reasonableness of the interstate fares as settled by the recent proceedings, and had considered in the proceeding before it merely the question as to whether the North Carolina fares were discriminatory. When the Commission had so recently made an adjustment of interstate fares after a nation-wide inquiry, it was not required to go over this work again in a proceeding to bring intrastate rates into harmony with them.

Intrastate Fares Discriminatory

The reasonableness of the interstate fares being established, there can be little question as to the discriminatory character of the intrastate fares. It is established that the

same service is afforded intrastate passengers as is afforded in interstate service; and, where this is true, discrimination is ordinarily established with sufficient certainty by showing a difference in rates. As said in *Illinois Com'n.* v. *United States*, 292 U. S. 474, 485, "The affect of maintaining a lower rate, intrastate, then the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions." Defendants endeavor to justify the difference in fares by contrasting the service rendered by the streamlined de luxe interstate trains with the poor service afforded by the branch lines; but intrastate passengers travel on the streamlined interstate trains and interstate passengers travel on the branch lines. The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. It is nothing short of nonsense to say that under such circumstances an intrastate fare of 1.65 as against an interstate fare of 2.2 does not constitute an undue discrimination in favor of intrastate passengers and against interstate passengers. When such discrimination is shown on a state-wide scale a general finding of discrimination is sufficient, and there is no need of a finding of discrimination against particular persons or with respect to particular fares. See *United States* v. *Louisiana*, 290 U. S. 70, 79 (distinguishing *Florida* v. *United States*, 282 U. S. 194, upon which plaintiffs particularly rely) where the Court said:

> "The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting in the aggregate a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from

the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate.

"A question different from that before us was presented in *Florida* v. *United States, supra.*. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in Northern Florida. It involved only one railroad and one commodity."

And it is equally clear that discrimination has been shown within the meaning of the statutory provision against the interstate commerce of the carriers in that, because of the intrastate fare, intrastate passengers are not making their proportionate contribution to the maintenance of the transportation system. The intrastate fare produces in North Carolina $525,000 less than would be produced by the interstate fare on the same volume of traffic, which means that intrastate passengers have paid just that much less than the Commission estimates to be their proper contribution for the service rendered. A failure of intrastate traffic to bear its just burden of expense means necessarily that a greater burden must be borne by interstate traffic if the transportation system is to be maintained at the level of efficiency which section 15a(2) contemplates; and this is unquestionably an undue discrimination against interstate commerce within the meaning of section 13(4).

It is not necessary for the Commission to find, as a prerequisite to an order raising intrastate fares, that such fares are noncompensatory or will result in a deficit in operating revenues of that particular branch of the business. On the contrary, it is for the Commission to say what portion of the revenue necessary to an adequate and efficient transportation system the various kinds of businesses engaged in by the carriers shall contribute; and an undue burden upon and discrimination against interstate commerce is shown where intrastate rates for a particular service are so low that the service will not contribute its proportionate part of the revenue necessary to the plan which the Com-

mission has devised for the development of the interstate system. It would greatly burden if not entirely wreck the transportation system of the country for local commissions to have the power to base intrastate rates or fares on their ideas as to how the expense of maintaining an adequate transportation system should be apportioned among the various classes of business carried on by the carriers. We must bear in mind, in this connection, what was so wisely said by Chief Justice Taft in the *Wisconsin* case, *supra*, that "commerce is a unit and does not regard state lines"; that the affirmative power of Congress in developing interstate commerce is clear; and that, "in such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable."

It must not be overlooked that the carriers here who are carrying intrastate passengers are interstate carriers, and that it is only because of their interstate business that they are able to furnish the present level of intrastate service. The Commission has fixed the rates and fares on their various classes of business with a view of maintaining their efficiency as interstate carriers for the service of the public; and the rate structure so carefully constructed should not be burdened by lower intrastate rates because local regulatory bodies may entertain different theories of rate making. These observations apply with peculiar force in the case at bar, where it appears that the interstate fares fixed by the Commission have been accepted as reasonable intrastate fares by 44 of the 48 states of the Union. In the language of the *Louisiana* case, *supra*, there is nothing in the conditions prevailing in the other four states "so different from the rest of the country as to lead to the conclusion that the intrastate rates raised to the reasonable general interstate level would not themselves be reasonable."

Consideration Given Stabilization Act

The contention that adequate consideration was not given by the Commission to the representations of the Price Administrator under the Stabilization Act, requires but brief consideration. The record shows that full consideration was given the representations of the Price Adminis-

trator, both in the hearings in Ex Parte No. 148 and in the hearing which resulted in the order here involved. As a matter of fact, the reopening of proceeding Ex Parte No. 148 resulted in the suspension of the authorized increase in freight rates; and the Commission, in the passage of its order of April 6, 1943, above quoted, 255 I. C. C. 357, 394-395, pointed out why passenger fares were treated differently. In the report accompanying the order here complained of the Commission showed that it had given full consideration to the contentions of the Price Administrator, saying:

> "The Price Administrator contends that the proposed increase in fares is inconsistent with the wartime stabilization program; further, that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if we should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares, in Increases in Texas Rates, Fares, and Charges, 253 I.C.C. 723, and in the report on further hearing in Increased Railway Rates, Fares, and Charges, supra, we discussed contentions that rate increases therein proposed would be inconsistent with the efforts of the Government to avoid inflation and would conflict with the provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act and exclusive regulations thereunder. We concluded that the provisions of these acts, except those pertaining to the giving of notice and consent to intervene to the designated federal agent, made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by railroad. The provisions of these acts respecting the giving of notice and consent to intervene to the designated federal agent have been complied with in each of these proceedings. The evidence bearing upon the further contention of the Price Administrator has been recited hereinbefore."

An examination of the report in Increases in Texas Rates, Fares and Charges, 253 I. C. C. 723, 734-736, referred to in

the above quotation, shows that the Commission was fully aware of its duty under the Stabilization Act and was discharging it in accordance with the spirit as well as the letter of that act. What weight was to be accorded the contentions advanced by the Price Administrator pursuant to the act, was a matter committed to the discretion of the Commission; and the right to review the exercise of that discretion is given neither to the Price Administrator nor to this Court. Whatever question might have existed with regard to this was set at rest by the recent decision of the Supreme Court in the Jersey City case, supra, where Mr. Justice Jackson, speaking for the Court, said:

> "The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. It is without power to protect these essential transportation agencies from raising labor and material costs. It can decide only how such unavoicable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. * * * The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. *We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court, to determine.* The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the company. Cf. Hudson & Manhattan R. Co. v. United States, 313 U. S. 98, 61 S. Ct. 884, 85 L. Ed. 1212. If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general

principles which protect the finality and integrity of decisions by administrative tribunals." (Italics supplied).

We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record, for the reasons above stated, however, our decision would not be different if this evidence were admitted and considered.

Our conclusion is that the order complained of is a valid exercise of power by the Commission; that it is supported by sufficient findings of fact, which in turn are supported by substantial evidence; that it is not arbitrary or unreasonable; and that it is not rendered invalid by anything contained in the Stabilization Act. The injunction prayed for will accordingly be denied and the suit will be dismissed. Because of an intimation in the argument that, in the event of an adverse decision, plaintiffs would ask a stay pending appeal, we have given consideration to that matter and are of opinion that such stay should not be granted. Not only is the order of the Commission clearly valid in our opinion, but no circumstances have been shown which would justify this Court in ordering that it be stayed. Being entered by the Commission, it is presumptively in the public interest; its effect is merely to require intrastate passengers in North Carolina to pay the fares that interstate passengers are paying throughout the country and that intrastate passengers are paying in all except four of the States; and it is not possible to provide against damage which might result from a stay by requiring a bond. Under such circumstances, we think it clear that we should not grant the stay. Virginian Ry. v. United States 272 U. S. 658, 673. As said in the case cited:

"An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay

is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.

"In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

Injunction Denied and Suit Dismissed.

(S.) JOHN J. PARKER,
United States Circuit Judge,
Fourth Circuit.

(S.) I. M. MEEKINS,
United States District Judge,
Eastern District of North Carolina.

(S.) JOHNSON J. HAYES,
United States District Judge,
Middle District of North Carolina.

United States District Court, Eastern District of North Carolina, Raleigh Division

Civil Action No. 189

STATE OF NORTH CAROLINA; NORTH CAROLINA UTILITIES COMMISSION; CHARLOTTE SHIPPERS & MFRS. ASSOC., INC.; NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA AND B. F. RUSSELL; AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, PLAINTIFFS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEFENDANTS

JURISDICTIONAL STATEMENT BY INTERVENOR-PLAINTIFFS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The Intervenor-Plaintiff, the Economic Stabilization Director by the Price Administrator, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the order and decree in the above-entitled cause sought to be reviewed:

A STATUTORY PROVISIONS

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, 36 Stat. 1150, October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191; Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

B. THE STATUTE OF A STATE, OR THE STATUTE OR TREATY OF THE UNITED STATES, THE VALIDITY OF WHICH IS INVOLVED

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved. See statement of nature of case below.

C. DATE OF THE JUDGMENT OF DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED

The order and decree sought to be reviewed was entered on July 22, 1944. The petition for appeal was presented on September 16, 1944, together with an assignment of errors.

D. NATURE OF CASE AND OF RULINGS BELOW

This Appeal is from a final order and decree of the District Court of the United States for the Eastern District of North Carolina, entered July 22, 1944, denying Intervenor-Plaintiff's (Appellants') request for an injunction to set aside an order[1] of the Interstate Commerce Commission requiring the North Carolina railroads to maintain and apply passenger coach fares for intrastate transportation in North Carolina which shall be on bases no lower than the passenger fares presently maintained and applied by said railroads for accommodations in interstate application to and from North Carolina. The proceeding before the Commission was instituted by a petition of the North Carolina railroads under section 13 (4) of the Interstate Commerce Act, following a decision by the North Carolina Utilities Commission refusing to authorize an increase in intrastate passenger coach fares from the general basis of 1.65 to 2.2 cents per mile because the railroads had failed to show any present need for the added revenue. The order of the Commission causes a direct and substantial increase in the cost of living and in the costs of many business enterprises in North Carolina in which salesmen and other employees are required to engage in intrastate railroad travel.

Appellants intervened as Protestants in the proceeding before both the State and Federal commis-

[1] The Order in question was issued on May 24, 1944, as a "Corrected Order," dated May 8, 1944, in Docket No. 29036, *North Carolina Intrastate Coach Fares*, 258 I. C. C. 133, Commissioners Splawn, Aitchison, and Mahaffie dissenting.

sions. In the proceedings in the District Court, the Court granted Appellants' motion to intervene, accompanied by a complaint (petition) which alleged, among other contentions, that the Commission had failed or refused to give full effect to wartime conditions and the stabilization legislation, although it was under a duty to do so.

The District Court stated that full consideration had been given to the representations of the Price Administrator in this proceeding; and Appellants do not claim that the Commission denied them any procedural rights. Further, Appellants concur—and stated their concurrence to the District Court—with the view expressed in the Commission's opinion in this and other cases that the stabilization legislation "made no changes in or additions to the Interstate Commerce Act with respect to the rates, fares, and charges of common carriers by railroad." But the Appellants pointed out that this Court itself had recognized that, in the administration of the Interstate Commerce Act, the Commission was under a duty to accommodate the application of the statute to other Congressional policies, and in particular was under a duty to give full effect to wartime conditions and the stabilization legislation.

It is Appellants' contention that the facts of record provide no substantial basis in evidence for the Commission's fifth finding, approved by the District Court, that traffic moving under the intrastate fares was not contributing its fair share of the revenue requested to enable Respondents to render adequate and efficient

transportation service.[2] In its decision, the Commission found that, as a result of wartime conditions, net revenues of North Carolina railroads had become extraordinarily high, and the passenger service was earning very substantial profits. Computation of the passenger operating costs per mile indicates them to be about .98 cents in 1942 as compared to the intrastate fare of 1.65.[3] Hence, the Commission's fifth finding must have been predicated on the fact, relied on to

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[2] Such a finding is essential to a finding of undue, unjust, and unreasonable discrimination against interstate commerce under section 13 (4) of the Interstate Commerce Act. *Florida* v. *United States*, 282 U. S. 194, 292 U. S. 1. The Commission's order also found prejudice to passengers traveling in interstate commerce. Since the issue with respect to this determination would be resolved by an interpretation of the Interstate Commerce Act, without presenting a question of the Commission's duty to give effect to the stabilization legislation, the Appellants have left this aspect of the case to be raised for full consideration by the assignment of four errors by the Appellant State.

[3] This figure is an approximation computed from the railroad's evidence; they did not attempt to prove the cost of the service. Their exhibits showed, however, that the per passenger coach-mile revenue for 1942 was 1.560 cents and that the ratio of passenger operating expenses to revenues was 63 percent. Multiplying these figures results in the conclusion that the expense per passenger coach-mile was about .98 of 1 cent. This approximation is probably too high, rather than too low; the unit cost per coach passenger should be less than the average for the passenger service, because of the greater increase in coach loadings as compared with parlor and sleeping cars. Furthermore, the unit cost undoubtedly was lower for 1943 than for 1942, because, as shown by the record, the operating ratio of seven principal North Carolina railroads for the first nine months of 1942 dropped to 52.3, while coach travel in the Southern region increased 128.5 percent for the first ten months of 1943, as compared with the corresponding period of 1942.

sustain the reasonableness of the interstate rates at the level of 2.2 cents per mile, that passenger service deficits were incurred prior to 1942. In other words, as the District Court suggested in approving the interstate rates, the Commission looked not to the present but to the past and future in making its determination.

Such reasoning, however, nullifies the Commission's duty to give full effect to wartime conditions and the stabilization legislation or to meet the *present* economic crisis. To allow an industry to increase ceiling prices or rates to take advantage of wartime conditions in order to compensate for business losses during peacetimes—past or future—is diametrically opposed to the objective of that legislation.

In sharp contrast to the Interstate Commerce Commission's decision is the decision of the North Carolina Utilities Commission which considered the issues from a viewpoint consistent with the war stabilization program, and refused to authorize the increases of rates because of the phenomenally high net revenues enjoyed by the railroads, and because of their failure to show present need for additional revenue from the increased fares. In so doing, the North Carolina Utilities Commission gave effect both to section 1 of the Stabilization Act of 1942 (50 U. S. C. App. § 961), which expressly provides for the participation by state and municipal regulatory agencies in the wartime stabilization program, and also to the President's Executive Order No. 9328, section 4, 8 F. R. 4681, which expressly requests all State agencies to

disapprove rate increases consistently with the Stabilization Act and other State and Federal legislation.

The case presents the following questions:

(1) Was the Interstate Commerce Commission justified in disregarding wartime considerations and acting instead upon peacetime considerations in overriding an order of the North Carolina Utilities Commission which, by declining to authorize passenger fare increases not presently necessary, gives full effect to the wartime conditions consistently with the stabilization legislation?

(2) Did the order and decision of the Interstate Commerce Commission constitute an unlawful disregard, in the application of section 13 (4) of the Interstate Commerce Act, of the policy established by Congress in the stabilization legislation?

E. THE QUESTIONS ARE SUBSTANTIAL

The questions involved in this case are of importance to those traveling intrastate between points within the Southern region, not only in North Carolina, but also in Alabama, Tennessee, and Kentucky. These States are taking an appeal from a like District Court decision. Moreover, if the decision by this Court were favorable to North Carolina, possibly other southern state commissions would feel free to require that the carriers reinstate the intrastate fares in effect on September 15, 1942, on the basis of 1.65 cents per mile.

Apart from the effect of the decision on the intrastate fare structures of a number of states, the legal

issue is important. While Appellants appreciate that, as this Court has said, the weight to be given the Price Administrator's contentions is for the Commission to determine, they do not suppose that this statement by the Court had the effect of relieving the Commission from its duty to make basic findings supported by substantial evidence, *Florida* v. *United States,* 282 U. S. 194. Yet, if the facts of record herein do not compel the conclusion that, were full effect given to wartime conditions and the stabilization legislation, no increases of fares would be required by the Interstate Commerce Act, then Apellants cannot conceive of any case in which a finding could be made that a proposed increase would contravene the national stabilization policy. Consequently, approval of the Commission's finding in this case would have the effect of denying the sanction of judicial review to the Commission's duty to give full effect to wartime conditions and the stabilization legislation.

F. CASES SUSTAINING JURISDICTION

Interstate Commerce Commission v. *Jersey City,* 321 U. S. 755.

McLean Trucking Co. v. *United States,* 321 U. S. 67.

Southern S. S. Co. v. *National Labor Relations Board,* 316 U. S. 31.

Federal Power Commission v. *National Gas Pipeline Co.,* 315 U. S. 575, 590.

Florida v. *United States,* 282 U. S. 194.

G. DECREE AND OPINION OF THE DISTRICT COURT

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.*

We therefore respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

For the Economic Stabilization Director by the Price Administrator:

RICHARD H. FIELD,
General Counsel,
DAVID F. CAVERS,
Assistant General Counsel,
BERNARD M. FITZGERALD,
Transportation and Public Utilities Division,
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Dated September 16, 1944.

I have authorized the filing of this jurisdictional statement.

CHARLES FAHY,
Solicitor General.

Dated September 16, 1944.

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*(CLERK'S NOTE.—The decree and opinion are printed as appendices to the Jurisdictional Statement in the case of *North Carolina, et al.* v. *U. S.*, No. 560, October Term, 1944, and are not reprinted here.)

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 560.

STATE OF NORTH CAROLINA, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*.

Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF

for Appellants, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers' Association, Inc., and North Carolina Division of the Travelers' Protective Association of America, and B. F. Russell.

J. C. B. EHRINGHAUS
and
F. C. HELSLEY,
of Counsel for Appellants.

March, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1944.

No. 560.

STATE OF NORTH CAROLINA, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*.

Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF

for Appellants, State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers' Association, Inc., and North Carolina Division of the Travelers' Protective Association of America, and B. F. Russell.

OPINIONS.

The opinion of the specially constituted District Court is reported in *State of North Carolina* v. *United States*, 56 F. Supp. 606 (Pr. 548).*

* Pr.—Printed Record in Supreme Court.

The Findings of the Interstate Commerce Commission as to Coach Fares in North Carolina are reported in *Alabama Intrastate Fares*, 258 I. C. C. 133 (Pr. 69).

JURISDICTION.

On November 13, 1944, the Supreme Court announced its finding that probable jurisdiction had been shown by the statement filed by appellants (Pr. 596).

This being a proceeding to enjoin, set aside or annul an order of the Interstate Commerce Commission, jurisdiction is conferred by Section 238 of the Judicial Code and by the Urgent Deficiencies Act, October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. A. 43-48.

STATEMENT OF THE CASE.

The North Carolina case.

In the Courts Below:

This case comes to the Supreme Court on appeal from an order of the United States District Court for the Eastern District of North Carolina, Raleigh Division, sitting as a specially constituted Three-Judge Court, hereinafter referred to as the District Court, under the provisions of the Urgent Deficiencies Act, 38 Stat. L. 219.

The State of North Carolina, the North Carolina Utilities Commission, the Charlotte Shippers and Manufacturers Association, Inc., the North Carolina Division of the Travelers' Protective Association of America (and B. F. Russell, its authorized representative) all hereinafter referred to for convenience as North Carolina, had petitioned the District Court to enjoin, set aside and annul an order of the Interstate Commerce Commission (Pr. 1).

The order (Pr. 507) of that Commission, hereinafter referred to as the federal Commission, prescribed and fixed increased fares for travel in railroad coaches in intrastate commerce in Kentucky, Tennessee and Alabama, and in

North Carolina, over the lines of certain railroads, in four consolidated proceedings reported in *Alabama Intrastate Fares,* 258 I. C. C. 133 (Pr. 69).

The District Court denied the injunction prayed for by North Carolina as to North Carolina intrastate coach fares, and the Decree (Pr. 545) of the District Court dismissed North Carolina's suit. *State of North Carolina* v. *United States,* 56 F. Supp. 606 (Pr. 548).

From that decision North Carolina appeals. No. 560 (Pr. 575).

The Kentucky case.

The orders of the federal Commission as to intrastate coach fares in Kentucky, Alabama and Tennessee were the subject of a similar suit in a like Court in the Western District of Kentucky.

The District Court in Kentucky dismissed the petitions of the States of Kentucky, Tennessee and Alabama to set aside the order of the federal Commission. An appeal has been taken by these three states. No. 574.

The Price Administrator's cases.

Fred M. Vinson, federal Economic Stabilization Director, by Chester Bowles, Price Administrator, hereinafter referred to as the Price Administrator, was a party by intervention to the proceedings before the Interstate Commerce Commission, protesting against any increases in the intrastate coach fares in North Carolina, Kentucky, Tennessee and Alabama. He was also a joint petitioner and complainant, and intervener, in the proceeding before the District Court in North Carolina (Pr. 37), and in the proceeding before the District Court in Kentucky, seeking to enjoin, set aside and annul the order of the federal Commission which required increases in the intrastate coach fares in the four respective states.

The Price Administrator has perfected two separate appeals, seeking to reverse the said orders of the District

Court in North Carolina and in the District Court in Kentucky as to the Kentucky, Tennessee and Alabama fares. His appeal, companion to North Carolina's appeal as to North Carolina fares, has been docketed in the October Term, 1944, as No. 561, and his appeal in the Kentucky Case is No. 592 (Pr. 585-587).

North Carolina has supported the position of the federal Price Administrator in the proceedings before the federal Commission and before the District Court in North Carolina.

The four appeals.

The subject-matter of the two appeals, in Nos. 560 and 561, as to North Carolina fares, is the same, although the Points to be Relied Upon by the Price Administrator differ from those to be relied upon by North Carolina.

The subject-matter of the appeal by Kentucky, Tennessee and Alabama No. 574 and of the appeal by the Price Administrator from the decision of the District Court for the Western District of Kentucky No. 592 as to the fares in those three respective states is substantially similar to the subject-matter in the Appeals, Nos. 560 and 561, from the decision of the District Court for the Eastern District of North Carolina.

The four appeals seek the injunction, setting aside and annulment of the orders of the federal Commission which were entered in conjunction with its findings and opinion in *Alabama Intrastate Fares*, 258 I. C. C. 133-134 (Pr. 69).

The fundamental theme of the four appeals is that the federal Commission's orders, requiring that the railroads increase their coach fares for intrastate travel in Kentucky, Tennessee, Alabama, and North Carolina, represent an unwarranted exertion of federal power over intrastate commerce within each of the four respective states.

THE STATUTORY PROVISIONS

under which the proceedings before the Interstate Commerce Commission arose.

The Interstate Commerce Commission on October 13, 1943, instituted four investigations (Pr. 141),

> "upon petitions by the rail carriers operating respectively, in Alabama, Kentucky, North Carolina and Tennessee, to determine whether the refusal of the regulatory authorities of those States to authorize or permit the application to the transportation of passengers traveling intrastate therein of fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce . . ."

(*Alabama Intrastate Fares,* 258 I. C. C. 133-134.)

The statutory provisions under which the four investigations were conducted and under which the orders were made by the federal Commission requiring increases in the intrastate coach fares in the four states of Kentucky, Tennessee, Alabama and North Carolina, are set forth in Section 13(4) of the Interstate Commerce Act (U. S. C. Title 49, Sec. 13(4)):

Section 13(4) is reproduced in Appendix A.

The federal Commission also gave consideration to the revenue needs of the railroads under the Rule of Ratemaking in Section 15a(2) of the Interstate Commerce Act. (U. S. Code, title 49, Sec. 15a(2) because of its dovetail relation to Section 13(4)).

Section 15a(2) is reproduced in Appendix A.

The federal Commission issued an order August 1, 1943 (Pr. 524), authorizing certain railroads to increase their

coach fares in the south, without any hearing, findings or report; and permitted tariffs to become effective October 1, 1942, without any hearing, findings or report even though protests and petitions for suspension had been filed, all without regard to the statutory requirement that the burden of proof to justify such increases shall be upon the carrier as provided in Section 15(7) of the Interstate Commerce Act.

Section 15(7) is reproduced in Appendix A.

Section 13(1) provides that complaints shall be brought by filing a petition with the Commission. Section 13(1) is reproduced in Appendix A.

Section 13(2) provides that the Commission shall investigate any complaint forwarded by the Railroad Commission of any state at the request of such Commission.

The same paragraph of Section 13 provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Portions of Section 13(2) are reproduced in Appendix A.

Section 15(1) provides that a full hearing shall be held by the Commission. A portion of Section 15(1) is reproduced in Appendix A.

Section 3(1) prohibits undue preference and advantage. Section 3(1) is reproduced in Appendix A.

CHRONOLOGICAL HISTORY OF THE COACH FARES

in the South and the proceedings relating thereto before the federal and state commissions.

1933-1937.

The 1936 Fares Case.

In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, the federal Commission reported its findings in the first comprehensive and nationwide investigation which it had ever made of passenger fares for the several classes of passenger service by railroads (214 I. C. C. at page 175).

Separate findings of fact in elaborate detail were set forth in that 1936 Report with respect to fares for numerous types of passenger service such as coach fares, pullman fares, commutation fares and charges for travel in extra-fare trains, in the nation, in the southern region, and other districts respectively.

Separate findings of fact were set forth in detail in that 1936 Report with respect to the revenues per coach-mile and expenses per coach-mile; revenues per passenger mile in coaches and expenses per passenger mile in coaches; and average car-occupancy, as it affects the relation of coach revenues to expenses in the nation and in the several major districts.

No such comprehensive and analytical investigation of passenger fares for travel in coaches in the nation, in the southern region, or on the lines of particular southern railroads has been made or reported by the federal commission since that investigation, which was concluded in 1936.

The ultimate findings in the 1936 Fares Case.

The Findings in the *1936 Passenger Fare Case* were well summarized in the Report in *Alabama Intrastate Fares*, 258 I. C. C. 133 at page 135 (Pr. 72), as follows:

> "On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and *1.5 cents* per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5 cent fares maintained by other roads where competition made that necessary."
>
> "We prescribed (in the 1936 Fares Case) maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, *without prejudice to the maintenance of lower* fares in coaches or pullman cars. The pullman surcharge was found unreason-

able and its cancellation was required. The existing experimental fares in southern territory were *found not unreasonable or otherwise unlawful*" (258 I. C. C. at page 135). (Italics supplied.)

The experimental fares referred to therein included the coach fare of 1.5 cents per mile, which was in effect on most of the railroads in Southern territory. Attention is directed to the fact that, even in the four intrastate fares cases, decided March 25, 1944 (*Alabama Intrastate Fares*, 258 I. C. C. 133), the federal Commission expressly stated that it had found, in the *1936 Fares Case*, that the *1.5 cent coach fare in Southern territory was "NOT UNREASONABLE OR OTHERWISE UNLAWFUL"* (Pr. 72).

The ultimate findings of the federal Commission, in that *1936 Report* (214 I. C. C. 174), comprise the very groundwork and foundation for the intrastate coach fares which existed on many railroad lines when these Section 13 proceedings in the four Southern states were instituted by the federal Commission.

The ultimate findings in the *1936 Passenger Fare Case* (214 I. C. C. 174) that the coach fare of 1.5 cents per mile in the south was "*not unreasonable or otherwise unlawful,*" under the adverse economic conditions then existing, formed the principal foundation upon which the four state Commissions of Kentucky, Tennessee, Alabama and North Carolina relied in 1942 in denying the railroads' petitions to those commissions for authority to increase the intrastate coach fares under greatly changed conditions and over-prosperous financial conditions of the southern railroads.

And the findings in the *1936 Passenger Fare Case* (214 I. C. C. 174) were leaned heavily upon by the four states in the four proceedings before the federal Commission in resisting the exertion of federal power over these intrastate coach fares.

Again before the District Courts in Kentucky and in North Carolina, the four states leaned heavily upon the

findings in the *1936 Passenger Fare Case,* in seeking to enjoin, set aside and annul the orders of the federal Commission in *Alabama Intrastate Fares,* 258 I. C. C. 133.

Major findings in 1936 Fares Case.

To understand the full import of the findings in the *1936 Passenger Fares Case* it will be necessary to narrate and summarize the major findings of fact and concepts which formed the basis for the federal Commission's ultimate finding in the *1936 Fares Case* that the 1.5 cent fare in southern territory was "not unreasonable or otherwise unlawful".

The keynote, which resounds throughout the lengthy Report in the *1936 Fares Case,* is that the then existing deficiencies in passenger revenues were due to lack of passengers per train and per car, and lessened car-occupancy; that increasing the fares would produce, not increases, but reductions in revenue; and that the way to increase the net revenues so as to exceed expenses per car-mile or per passenger-mile was to *reduce* the fares; and that reduced fares would increase passenger travel and car-occupancy to such an extent that the unit expense per passenger-mile would be less than the reduced fare.

That keynote may sound strange to logic, but it was founded upon actual experience, and the Commission was careful to set forth in its Report much evidence which proved that, in actual practice, increased fares had reduced revenues, and that reduced fares had increased revenues, thereby reducing the unit expense per passenger mile.

Let us quote a few extracts from the Report in the *1936 Fares Case* to show the foundation for this view of the underlying basis which induced the Commission to reduce the basic fares in spite of the fact that such reduced fares would be substantially less than the then existing expenses per passenger-mile.

The Commission ordered a reduction in the maximum general basic fares to 2 cents per mile in coaches and 3 cents per mile in pullman cars, when the

> "expense per passenger-mile for all passenger cars is approximately 2.39 cents in the eastern district and 4.16 cents in the southern district",

in the year 1934 (214 I. C. C. at page 264 and 266).

In the year 1920, an increase of 20 per cent in fares which was permitted

> "not only failed to attain its purpose, but was attended by a substantial net loss in passenger revenue". (214 I. C. C. at page 176.)

The Commission found that for the year 1933 the

> "averages per passenger-mile thus arrived at are, for all passengers, 2.08 cents in revenue and 2.85 cents in expenses; for coaches, other than suburban, 1.88 cents (in revenue) and 2.73 cents (in expenses) respectively." (214 I. C. C. at page 180.)

The corresponding figures in Appendix I table 2, for the same year, 1933, in the southern district were 1.67 cents revenue per passenger mile and 3.25 cents expense per passenger mile in coaches other than suburban (214 I. C. C. at page 266).

In the 1936 Fares Case the Commission found that the southern railroads had been benefitted greatly by the coach fare of 1.5 cents; and the principal southern railroads strongly urged that that fare be continued and not disturbed.

In support of its judgment that reductions in the basic fares would increase car-occupancy and reduce unit expenses per passenger mile below the prescribed fare, the Commission dwelt at length in its Report in the *1936 Fares Case* upon the actual experience of the lines in the southern

territory with the coach fare of 1.5 cents per mile, and upon the necessity for a lower fare in the southern district than the reduced prescribed basic fare of 2 cents per mile in coaches in other sections of the country. To illustrate, bearing in mind that the railroads, whose fares are at issue in the North Carolina case, are the Atlantic Coast Line, the Louisville and Nashville (to a minor degree), the Seaboard Air Line Railway and the Southern Railway, the Commission said in the 1936 Fare Case, at page 188 that:

> "The approximate passenger-fare basis per mile now (then) in effect, throughout the South, (except on certain named lines) is 1.5 cents in coaches and 3 cents one way . . . in pullmans."
>
> "In March 1931 the Southern placed on sale round-trip tickets at 1 cent per mile, good on Sundays and in coaches only, between all stations on its system within a radius of 100 miles, later extended to 150 miles. This experiment immediately brought satisfactory returns and convinced this respondent that a fare sufficiently low would attract substantial traffic. (at page 189)
>
> "The Southern on September 15, 1932, established a one-way fare of 1.5 cents per mile, good in coaches only, between Winston-Salem and Goldsboro, N. C., and intermediate stations, and between Knoxville and Chattanooga, Tenn., and intermediate stations, the latter experiment being extended in the following February to and including Bristol, Tenn. This fare brought an immediate satisfactory response from the public. The first month of the experiment in North Carolina showed an increase over the corresponding month of the previous year of 223 per cent in passengers and 59 per cent in revenue, with an increase in train-miles of only 0.52 per cent". (page 190)
>
> "The Tennessee experiment was equally satisfactory. Commencing in the latter part of 1932, the 1.5 cent fare was extended over other portions of this respondent's (Southern Railway) lines, with similar successful results . . ." (page 190)
>
> "For example, between Asheville, Charlotte and Salisbury, N. C. and intermediate stations, it was established on January 15, 1933, and by October of that year

the number of tickets sold had increased above those for the corresponding months of 1932 from 2,949 to 16,257, or 451 per cent, the revenue had increased 166 per cent, and the additional train-miles operated by only 2.7 per cent. (page 190)

"The results from these experiments convinced this respondent that the fare of 1.5 cents should be given a trial over its entire system, and on December 1, 1933, that fare was so extended. (page 190)

"The Southern attributes this increase in its passenger revenue almost wholly to the stimulation in coach travel induced by the 1.5 cent fare." (page 191)

"This respondent (Southern Railway) *feels strongly* that in the southern district *any fare higher than 1.5 cents* in coaches will not attract volume traffic to the rails, but that, at such a fare, passenger traffic in coaches can be made profitable. It *asks* that its present fare basis (1.5 cents per passenger-mile in coaches) *be not disturbed*, and that no order be made against it in respect of passenger fares". (192)

The Commission then went on to relate, in detail, the similar experience of the Seaboard Air Line Railway (one of the principal respondents in the North Carolina Case); and the Commission said, as to the Seaboard, at page 194 that:

"These illustrations are sufficient to indicate the much more favorable results from the 1.5 cent than from the 2-cent experiment. The increase on the Seaboard, 1934 over 1933, was 68.6 per cent in number of passengers carried and 39.7 per cent in passenger revenues. Taken as a whole, the revenue results under the reduced fares on the Seaboard are as favorable as those on the Southern" . . . "The Seaboard is in accord with the Southern that the present fare basis (1.5 cent) throughout the South should be continued." (page 194)

"The experience of the Louisville and Nashville Railroad Company (also a respondent in the North Carolina Coach Fares Case) . . . in respect of its passenger traffic and revenues do not differ greatly from those of the Southern and the Seaboard."

The Commission, at pages 195 to 200 of its Report in the *1936 Fares Case*, considered the contention of the Atlantic Coast Line (another important respondent in the North Carolina Coach Fares Case) that

> "the present 1.5-cent fare in the southern district is too low". (at page 200)

And the Commission disposed of the Coast Line's contention that higher fares "would have drawn the same number of passengers as did the 1.5 cent fare" by saying:

> "The Coast Line, by its proposed future basis, concedes that the latter assumption cannot reasonably be made, and it would seem that the experience of the southern respondents generally, including that of the Coast Line, under the experimental fares definitely establishes that the former assumption is likewise fallacious". (at page 200)
>
> "The day when an increase in basic fare was quite certain to produce a corresponding increase in revenue is gone". (at page 200)

In stating its summary of the findings (at pages 253 to 256 of the Report) in the *1936 Fares Case* in prescribing 2 cents per passenger mile in coaches and 3 cents per passenger mile in pullmans, as the "general maximum fare basis", (page 255) the Commission said that:

> "There is doubt whether at least in the *southern district* a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any *higher* fare, and it may also be that round-trip fares on both coach and pullman traffic at a *lower* rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents". (at page 255)

In stating its ultimate conclusions at page 256 of its Report in the *1936 Fares Case* that the general maximum

coach fare should be 2 cents per mile, the Commission expressly provided that this finding was

> "without prejudice to the maintenance of lower fares in coaches or in pullman cars, or both, in any one or more of the major districts of the country" . . .

(Pr. 72) and that

> "All outstanding section 13 orders affecting intrastate fares which are inconsistent with the conclusions herein reached will be modified so as to permit the bases prescribed or authorized herein to become effective or to continue in effect, as the case may be". (at page 257)

Throughout the Report in the *1936 Fares Case*, prominence is given by the Commission to its findings that coach travel in the south differs substantially from coach travel in other regions of the country; and the opinion is expressed in the Commission's conclusions that lower coach fares would produce better revenue results for the *southern* carriers than the general maximum basis of 2 cents per mile.

Later the Commission took occasion to justify its finding in the *1936 Fares Case* that reduced fares would increase travel and reduce the expense per passenger mile.

In the 1936 Fares Case and later cases, the Commission specifically recognized the necessity and the justification of the maintenance of the fare of 1.5 cent in the South in the interest of the southern carriers, on a lower basis than the general maximum prescribed fare of 2 cents for the Eastern and Western Districts.

In the Third Report in *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, decided February 12, 1940 the Commission said:

> "That higher fares do not necessarily produce more revenue is demonstrated by the results in the southern region under the increased 2-cent coach fare in 1938 as compared with the reduced 1.5-cent fare during 1937.

Excluding commutation, the results in coach revenue were $27,665,083, at an average per passenger mile of 1.48 cents in 1937, as compared with $22,071,383, or about 20 per cent less, at an average per passenger mile of 1.78 cents in 1938." (237 I. C. C. at page 276)

"On November 15, 1937, most of the southern roads increased their basic coach fare from 1.5 cents to 2 cents. As detailed in our third report, the results of that increased fare were disappointing, and on January 15, 1939, those roads restored the basic fare of 1.5 cents. On June 1, 1939, they established the round-trip coach fare of 1.35 cents." (237 I. C. C. at pages 272-273)

There the Commission stated the later facts as to coach travel in the south, since the *1936 Fares Case*, to justify the prediction, in the *1936 Fares Case*, that the fare of 1.5 cent in the South would result in increased travel, increased car occupancy, and reduced expenses per passenger mile.

There the Commission, in the Eastern Passenger Fare Case, was citing the success of the 1.5 cent fare in the South and the failure of a higher fare of 2 cents in the South from November 15, 1937, to January 15, 1939 as a reason why the Eastern railroads should not be permitted to publish their proposed increased fares in the Eastern district.

It was this successful experience of the southern railroads with the fare of 1.5 cents which prompted the Commission to find, in the Third Report in the *Eastern Case*, that

"The future net revenue results to the Eastern railroads will probably be more favorable under 2-cent than under a 2.5-cent basic coach fare in eastern territory". (237 I. C. C. at p. 286)

The Commisison denied the petition of the Eastern carriers for an extension of the 18 months' period, permitted in the Second Report in the Eastern Case, for charging the 2.5 cent fare.

Throughout the three Reports in the *Eastern Fares Cases* (227 I. C. C. 17, 227 I. C. C. 685, and 237 I. C. C. 271) the Commission recounted, time and again, the success of the Southern railroads under the 1.5 cent fare, which had been approved by the Commission as "not unreasonable or otherwise unlawful".

Even a slight increase in car-occupancy causes a sharp reduction in unit expenses per passenger mile.

In the *1936 Fares Case* the Commission considered and commented at length upon the relation of the expenses per coach-mile and per passenger mile in coaches to the approved fare of 1.5 cents; and to the marked effect which even a slight increase in car-occupancy (number of passengers carried per coach) would have in reducing the expense per passenger mile and increasing the profit from passenger train operations.

At page 182 of the Report in the *1936 Fares Case* the Commission said:

> "If the volume of rail passenger traffic can again be increased, the unit cost will decline when computed in the manner in which the 1933 cost was computed." (as appears in the Report and in the Appendices thereto in detail)
>
> "Thus, an increase of only 0.79 passengers in the average car-occupancy for 1933 of 11.2 in the eastern district would have been sufficient, the average passenger-mile revenue and average journey remaining the same, to eliminate the entire passenger deficit of $11,500,400 for 1933 in that district".

If a small increase of less than one passenger per car would have had such a surprising effect upon net revenue from passenger traffic in the Eastern district, it is apparent that the increase of 36.66 passengers in coach-occupancy in the south, 1943 over 1933 (from 8.3 passengers to 44.96 passengers) (Pr. 341) must have produced an enormous change in the net revenue from passenger traffic in the south, and

a vast reduction in the expense per passenger-mile in coaches. That is exactly what has happened, and what the Commission failed and refused to consider in the North Carolina Coach Fares Case.

Commissioner Meyer in his separate opinion in the *1936 Fares Case*, cited, from the evidence, an example of the marked effect of increased car-occupancy, created by extremely low fares, in increasing the profit per train. He said (214 I. C. C. at page 261): "The round-trip fare of $3.50 per passenger for the round-trip distance between Washington and New York", "approximates *three-fourths of 1 cent per passenger mile. It fills the coaches.*"

Commissioner Meyer further said, at page 261 that:

> "Assuming a coach capacity of 80 passengers, and 10 coaches to the train, if the coaches are fully occupied the train yields a net profit of $1,663. If the percentage of occupancy be 75, the net profits drop to $963, while if the occupancy is only 50 per cent the net profits drop to $263. These calculations are based upon cost data taken from the passenger-traffic report of the Federal Coordinator of Transportation. The report in this proceeding shows that average occupancy is far below 50 percent, varying with roads and regions. The fare of $3.50 approximates three-fourths of 1 cent per passenger-mile. It *fills the coaches.* If that many people should travel on all days and several times each day there would be no question of 2-cent and 3-cent fares. We would then probably have petitions to establish *quarter-cent and half-cent basic fares.*

What Commissioner Meyer described (at page 262) as "a hope or speculation" has come true. Under changed conditions the coaches are crowded beyond seating capacity. And yet the federal Commission, in its investigation of October 13, 1943, into the intrastate coach fares in Kentucky, Tennessee, Alabama and North Carolina, failed and refused to take into consideration the fact that the increase in average coach occupancy in the south from 8.3 passengers in 1933 to 44.96 passengers in 1943 (Pr. 341) had

sharply reduced the unit expenses per passenger-mile far below the then existing coach fares.

The Commission found in the *1936 Fares Case* (page 180) that for the year 1933 the "average per passenger mile thus arrived at are, for all passengers, 2.08 cents in revenue and 2.85 cents in expenses; for coaches, other than suburban, 1.88 cents (in revenue) and 2.73 cents (in expenses) respectively".

For the year 1933 the national average car-occupancy in coaches, other than suburban, was 10 passengers. (214 I. C. C. at page 266, Appendix I table 2.)

The corresponding figures, in the same table, for the Southern district, were: 1.67 cents, revenue per passenger mile and 3.25 cents expense per passenger mile in coaches other than suburban; and the car-occupancy in the Southern District was 8.3 passengers.

The coach car-occupancy of the North Carolina lines (respondents in the North Carolina Coach Fare Case) in the first seven months of 1943 had increased to 44.96 passengers or more than five times the southern district's average coach occupancy of 8.3 passengers in 1933 (Pr. 341), (Tasin's exhibit 9, page 31 in I. C. C. No. 29036).

The expenses in 1933 in the Southern district of 3.25 cents per passenger mile in coaches times 8.3 passengers made the coach-mile expense 26.975 cents. (Shown in 214 I. C. C. at page 266, Table 2, as 26.95 cents).)

That expense per coach mile divided by the 1943 coach-occupancy of 44.96 passengers would have shown an expense per passenger mile in coaches in the south of only .6 of one cent. (This does not take into consideration increased expense in 1943 over 1933.)

Thus the Commission's prophecy, that the 1.5 cent fare in the south would increase car-occupancy, thereby reducing the expense per passenger mile has been fulfilled to a surprising degree, and far beyond any reasonable expectancy which may have been justified by the facts in the year 1936.

And yet the Commission has failed and refused to consider in the North Carolina Fares Case the fact that the great increase in coach occupancy since the *1936 Fares Case*, has greatly reduced the expense per passenger-mile, and even though the Commission has expressly found that increased car-occupancy has only a very slight and negligible effect upon increased expenses, and that a change from light passenger travel to heavy passenger travel may be accompanied by only a negligible increase in the passenger train expenses.

A heavy increase in average coach-occupancy causes only a negligible increase in expense per coach-mile.

In the *Eastern Passenger Fares Case* at page 24 the Commission said:

> "The difference in the cost of operating the average train when filled and when empty or partly filled is negligible."

At page 190 in the *1936 Fares Case* the Commission found that with the reduction in fare to 1.5 cents in North Carolina on the Southern Railway:

> "The first month of the experiment in North Carolina showed an increase over the corresponding month of the previous year of 223 percent in passengers and 59 percent in revenue, with an increase in train-miles of only 0.52 percent". (p. 190)
>
> "For example, between Asheville, Charlotte, and Salisbury, N. C., and intermediate stations, it was established on January 15, 1933, and by October of that year the number of tickets sold had increased above those for the corresponding months of 1932 from 2,949 to 16,257, or 451 percent, the revenue had increased by 166 percent, and the additional train-miles operated by only 2.7 per cent. (page 190)

In the *1936 Fares Case* the Commission dealt extensively with the relation of revenue (fares) to expenses per coach

mile and per passenger mile in coaches, and the effect of increased car-occupancy upon expenses and profits. In the *North Carolina Fares Case* the federal Commission failed and refused to give any consideration whatsoever to expenses per passenger-mile in coaches under the vastly changed conditions, and failed and refused to consider proffered evidence as to the effect of the vastly increased coach occupancy in reducing the expenses per passenger mile in coaches.

Extensive statistical studies of the relation of fares to expenses of different classes of passenger service were accorded major prominence in the Report in the 1936 Fares Case.

In the Report in the *1936 Fares Case* the Commission showed, in Appendix I, Table 1, the total operating-unit expenses for the years 1929 to 1933 inclusive; in Table 2, the passenger revenues, expenses and car occupancy for the year 1933, separately for the nation and for each of the three districts; the Revenues per passenger-mile in all passenger cars, in suburban coaches, in other coaches, and in pullman cars; and separately the expenses per passenger-mile in all passenger cars, in suburban coaches, in other coaches and in pullman cars, and like statistics per passenger car-mile; and the passenger-miles per car-mile in the several types of cars (214 I. C. C. at page 266).

Table 3 shows the revenues compared with expenses per train mile, car-mile and passenger mile, separately for the different types of passenger cars, separately for limited trains, main-line local trains and branch-line local trains (214 I. C. C. at page 267).

Appendix 2 shows, by major districts, for a long period of years, 1922 to 1934, inclusive, the passengers carried, passenger revenue, passenger-miles and average journey per passenger (214 I. C. C. at pages 268 to 271).

Appendix 3 shows in elaborate tables the methods employed in determining the total constructive passenger-

miles, etc., required to produce certain revenue at varied fares.

This description of those Appendices and tables shows the completeness and thoroughness of the Commission's investigation of the relation of expenses to revenues for the various types of passenger service in the several major districts of the nation.

This description of these Appendices and tables is recited here for the purpose of directing the attention of the Court to the fact that the Commission, in the North Carolina Fares Case, failed and refused to give any consideration whatsoever to the relation of expenses per coach mile or per passenger-mile in coaches to the coach fares.

Why were those matters so all-important in the *1936 Fares Case*, and too insignificant to deserve any consideration, or even mention, in the Commission's Report in *Alabama Intrastate Fares, supra*?

Differences between the unit expenses and fares in reserved-seat pullman and parlor cars, and the unit expenses and fares in non-reserved seat coaches, were carefully analyzed in the Report in the 1936 Fares Case.

In the *1936 Fares Case* the Commission studied the relationship of expenses of travel in coaches to travel in pullman cars.

Appendix I, Table 2, shows that the expenses per passenger mile in the southern district for 1933 were 3.25 cents in coaches and 5.10 cents in pullmans (214 I. C. C. at page 266). In that year the expense in pullmans was 1.85 cents per passenger-mile *more* than in coaches.

Based upon studies of carriers in the western district the Commission found, at page 240, that the weight of pullmans is 77.78 tons, and of coaches 57.09 tons, and that:

> "upon the basis of excess weight alone, these studies would indicate that the rail charge in pullmans should be the difference between 3.014 cents and 1.485 cents, or 1.529 cents".

The Commission then found at page 241, that:

> "the present fare structures in the South and the West may not be condemned as unlawful by reason of the spreads which they reflect between the fares in pullmans and coaches".

The spread thus approved in the south was between 1.5 cents and 3 cents, a spread of 1.5 cents.

In *Eastern Passenger Fares in Coaches*, 227 I. C. C. 17, the Commission again referred to the formula for the determination of the relation of revenue to expenses of passenger traffic employed in the *1936 Fares Case*, and said, at page 24:

> "Even considering the increased operating costs to the applicants since 1936, these figures, while approximations, point strongly to the conclusion that whatever the exact passenger car deficit may be today (April 1938), it is *chargeable largely to the pullman and not to the coach service.*"

In the *North Carolina Fares Case* the Commission gave no consideration whatsoever to the spread between pullman and coach fares under the changed conditions and greatly increased car-occupancy of coaches in 1942 and 1943, and much smaller increase in car-occupancy of pullmans, as demonstrated in the evidence in the North Carolina Fares Case. The obvious effect of that great change has been to increase the spread between the expense per passenger mile in coaches and pullmans, whereas the order of the Commission in the North Carolina Fares Case reduced the spread in fares to 0.8 cent (the difference between the present intrastate pullman fare of 3.0 cents and the prescribed intrastate coach fare of 2.2 cents).

How could the Commission know what should be reasonable fares for coach service and pullman service under the greatly changed conditions of 1942 and 1943 without determining as it did before, whether the pullman as well as

coach travel is paying its proportionate share of the passenger expenses?

In the *1936 Fares Case* the Commission dwelt at length upon the relative expense of coach service and pullman service, in arriving at its conclusions. In the *North Carolina Fares Case* the Commission made no inquiry and made no finding upon this point. The Commission ignored even its own prior finding that the trouble was with *pullman*, not coach, fares.

In the 1936 Fares Case the Commission found that the superior quality of service provided in reserved seat deluxe coaches in streamlined trains justified a higher fare than in non-reserved seat coaches in ordinary trains.

In the *1936 Fares Case* the Commission considered the difference in the character or quality of the service afforded by improved de luxe equipment in "extra fare" trains and streamliners. The Commission definitely advised the carriers that improvement in quality of service was necessary in order to increase rail passenger travel. The Commission said, at page 183:

> "It seems just as certain that, no matter how much of an increase in travel volume there may be in the future, (meaning total travel by all modes of transportation) travel by railroad will continue to decline, or at least will not increase nearly as much as the increase in total volume, unless it be made more attractive than it has been in the past."

and at page 184:

> "Air conditioned and stream-lined equipment and faster schedules have helped greatly to attract traffic."
>
> "It seems plain that while continued improvements in equipment and service are highly desirable as an aid towards regaining traffic and keeping abreast of in-

creasing travel, they cannot and will not, by themselves, achieve the goal.

"The most important remaining avenue of appeal to the public is that of a reduction in fares".

There the Commission encouraged the acquisition of de luxe coaches and fast streamlined trains. And the Commission said, in *Eastern Passenger Fares in Coaches,* 227 I. C. C. at page 31, that its conclusions with respect to the carrier-proposed increase

"in the 2 cent basic coach fare should be understood not to refer to de luxe coach service, such as is afforded, for example, on the Mercury of the New York Central, which was placed in service between Cleveland, Ohio, and Detroit, Mich., in July 1936".

"We see no reason why passengers receiving coach service such as is afforded on the Mercury should not pay a HIGHER FARE than is charged for standard coach service."

In the *1936 Fares Case* the Commission separately considered the "extra fares" on certain trains and held at page 244, that:

"to justify an extra fare in addition to the standard charges the service upon which it is based should be definitely superior to that which is generally furnished".

In the *North Carolina Fares Case* the evidence shows that travel in reserved-seat de luxe coaches on streamlined trains was practically prohibited to the intrastate traveler who has to run a risk of getting any seat in an inferior coach on inferior trains.

In the *North Carolina Fares Case* the Commission failed and refused to give any consideration to the point advanced by North Carolina that the fares for travel in non-reserved seat and antiquated equipment on ordinary trains with poor schedules, should be less than the fares for travel in de luxe reserved seat coaches on fast stream-lined trains.

Many departures from the general basic coach fares were prescribed or approved by the federal Commission in the 1936 Fares Case and later cases.

In the *1936 Fares Case* the Commission prescribed or approved numerous and different fares. It prescribed 2 cent fares for coach travel in the west and in the East and approved 1.5 cents in the south. It approved fares higher than 1.5 cents in coaches for several lines in the south which had not published the 1.5 cent fare. It approved reasonable extra fares for service which is "definitely superior to that generally furnished" (214 I. C. C. at page 256). Many departures from the general or basic fares were approved, such as the fare of 6 cents per mile for coach or pullman service on the Grand Canyon line of the Sante Fe (214 I. C. C. at page 245); and 4 cents in pullmans and 2.667 in coaches between Whitewater and Fierror, N. Mex. The Gillmore and Pittsburgh Railroad Company, Limited, was permitted to charge 3 cents per mile in all classes of equipment (214 I. C. C. at page 245). Numerous other varying fares stated on page 245 were approved. The practices of adding inflated mileages for certain lines for tunnels or bridges, and the addition of bridge arbitraries were also approved (at page 246).

In a First Supplemental Report in the *1936 Fares Case*, 215 I. C. C. 350, the Commission approved widely varying fares for a number of individual railroads, and some of them published the same fares for coaches as for pullman service. Others carried much higher one-way fares than the round-trip fares. This was in accord with the Commission's finding in the first report in the *1936 Fares Case*, 214 I. C. C. at page 255, that

> "it may be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares."

The practice of maintaining lower round-trip than one-way fares is shown by the several reports in the passenger fares cases to be nationwide, but not uniform, as indicated above.

In the Second Supplemental Report in the *1936 Fares Case*, 215 I. C. C. 673, additional variations, from the general basic fare were approved for eight additional railroads, among which were the two North Carolina lines, viz., the Tennessee & North Carolina Railway Company, and the Norfolk Southern Railroad Company. The former charged a little less than 3 cents per mile and the latter 2.5 cents per mile in coaches and 1.4 cents for commutation fares (215 I. C. C. at pages 674, 675, 676).

The practice of charging lower fares for commutation service than for the general basic fares has been approved in numerous proceedings before the federal Commission, although

> "In the South and West commutation traffic has been relatively less important than in the East, but in all districts it has been steadily increasing in relative importance" . . . (214 I. C. C. at page 177)

See *Commutation Fares Between Washington and Virginia*, 231 I. C. C. 397; *Passenger Fares of Hudson & M. R. Co.*, 227 I. C. C. 741, 743, 753.

Different commutation fares were approved in different areas as being not discriminatory in *Davis* v. *Pennsylvania R. Co.*, 226 I. C. C. 723, 729.

In the Third Supplemental Report in the *1936 Fares Case*, 220 I. C. C. 749, the Commission approved additional exceptions of a number of individual railroads from the general basic fares, including one of the North Carolina lines, the Maxton, Alma & Southbound Railroad Company. Its fares averaged about 3.6 cents per mile (220 I. C. C. at page 750).

In like manner, the North Carolina Utilities Commission, in the proceeding before it, which was initiated prior to the federal Commission's investigation of the North Caro-

lina intrastate fares, gave consideration to the fares of individual lines and took different action with respect to the needs of individual lines, just as the federal Commission did in the First, Second and Third Supplemental Reports in the *1936 Fares Case*.

And yet the federal Commission, in the North Carolina Fares Case failed and refused to give consideration to the separate treatment of the individual lines by the North Carolina Utilities Commission.

Summary of the major findings in the 1936 Fares Case.

The *1936 Fares Case* was the first comprehensive investigation of the passengers fares for the several classes of passenger service. No such investigation has been made since then.

The Commission prescribed a basic fare of 2 cents per mile in coaches but approved the 1.5 cent fare in the South, and found that the fare of 1.5 cent was "not unreasonable or otherwise unlawful".

The Commission found that the southern carriers had been greatly benefited by the coach fare of 1.5 cents; and that the principal railroads strongly urged that that fare be continued.

The Commission specifically recognized the necessity and the justification for the maintenance of the fare of 1.5 cents in the south in the interest of the southern carriers, on a lower basis than the general maximum prescribed fare of 2 cents for the Eastern and Western districts.

The Commission gave special consideration to the relation of expenses per passenger mile in coaches to the coach fares and found that even a slight increase in car-occupancy causes a sharp reduction in unit expenses per passenger mile. Commissioner Meyer cited an instance where a fare of three-fourths of one cent "fills the coaches".

The Commission's prophecy, that the reduced coach fares which it prescribed and approved would increase car-occu-

pancy, reduce unit expense, and provide increased net revenues to the carriers, was more than amply fulfilled.

Increasing the average coach-occupancy causes only a negligible increase in the expense per coach-mile.

Extensive statistical studies of the relation of fares to expenses of different classes of passenger service were accorded major prominence in the report in the *1936 Fares Case*.

Differences between the unit expenses and fares in reserved-seat pullman and parlor cars, and the unit expenses and fares in non-reserved seat coaches, were carefully analyzed in the Report in the *1936 Fares Case*.

The Commission found that the superior quality of service provided in reserved-seat de luxe coaches in streamlined trains justified a higher fare than in non-reserved seat coaches in ordinary trains.

Many departures from the general or basic coach fares were prescribed or approved by the federal Commission in the *1936 Fares Case* and later cases.

Because of the scope of that investigation, and the character of evidence submitted, and the extensive findings made, and the principles of rate-making which were invoked by the federal Commission, and because no like investigation of interstate coach fares in the south had been made prior to that time or has been made since that time, the State Commissions of Kentucky, Tennessee, Alabama and North Carolina, in the proceedings before them, before the federal Commission and before the 3-Judge Court in Kentucky and North Carolina had the right to rely upon the findings of the Interstate Commerce Commission that conditions in the South warranted the lower basic coach fare of 1.5 cents than the prescribed fare of 2 cents in other major regions of the country; and they had the right to rely upon the finding that the fare of 1.5 cents which had and has proven so successful for the southern carriers, was "not unreasonable or otherwise unlawful".

Coach fares in the South have not been the subject of investigation by the federal Commission since the Four Reports in the *1936 Fares Case*, the latest of which was decided April 12, 1937.

1938-1940.

The Eastern Coach Fare Cases—1938-1940.

In *Eastern Passenger Fares in Coaches*, 227 I. C. C. 17, decided April 4, 1938, the federal Commission considered the application of the railroads in the eastern district with some exceptions, and in the Pocahontas Region, for authority to increase their basic passenger fare for travel in coaches from 2 cents to 2.5 cents per mile. The Commission found that the proposed increase had not been justified (227 I. C. C. at page 31).

In the Second Report in *Eastern Passenger Fares in Coaches*, 227 I. C. C. 685, decided July 5, 1938, the Commission, because of the fact that the "financial condition of the applicants has become progressively worse" and that the applicants were "in serious need of additional revenue" (227 I. C. C. at page 685) permitted an increase in coach fares from 2 to 2.5 cents for a limited period of 18 months.

In the Third Report in *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, decided February 21, 1940, the Commission, after the expiration of that 18-months period, found that

> "The future net revenue results to the eastern railroads will probably be more favorable under a 2-cent than under a 2.5-cent basic coach fare in the eastern territory"

(237 I. C. C. at page 286), and the Commission denied the carriers' petition for an extension of the time within which to charge 2.5 cents.

Throughout the three reports in the *Eastern Coach Fare Case*, the Commission recounted, time and again, the suc-

cess of the southern railroads with the 1.5 cent fare, and said: (237 I. C. C. at pages 272-273)

> "On November 15, 1937, most of the southern roads increased their basic coach fare from 1.5 cents to 2 cents. As detailed in our third report, the results of that increased fare were disappointing, and on January 15, 1939, those roads restored the basic fare of 1.5 cents. On June 1, 1939, they established the round-trip coach fare of 1.35 cents.

Thus the *basic one-way fare for travel in coaches on most of the southern railroads was 1.5 cents from December 1, 1933 until February 10, 1942, with the exception of the brief period of fourteen months from November 14, 1937 to January 15, 1939, when the experience with the 2 cent fare proved unsuccessful, and the 1.5 cent fare was restored.*

1942.

On February 10, 1942 the coach fares of 1.5 cents in the South were subjected to the nationwide horizontal increase of 10 per cent, which was applied to interstate fares. The State Commission permitted a concurrent increase in the intrastate fares.

The Nationwide Horizontal Increase in 1942 under I. C. C. Ex Parte 148.

Increased Railway Rates, Fares and Charges, 1942, 248 I. C. C. 545.

In November 1941 groups of railroad employes threatened a general railroad strike for higher wages throughout the nation effective December 1941 (248 I. C. C. 550).

In that month,—the month of the Pearl Harbor disaster, and the declaration of war against Japan,—the railroads throughout the nation on December 13, 1941 petitioned the federal and state commissions for authority to increase all of their rates, fares and charges (with some exceptions)

whatever they were or happened to be, by 10 per cent, because of that impending nationwide strike, which would have imperilled seriously the feverish preparations for war in the Pacific.

Joint expedited hearings were held by the federal and state commissions.

The fact that the entire proceedings received unusual expedition is shown by the fact that the case was submitted January 14, 1942, just one month and a day after the petition of the carriers was filed, and the case was decided March 2, 1942.

That proceeding, known as *Ex Parte 148, was not an investigation into the reasonableness of any particular rate or charge or fare, of any type, on any line, in any district.* The proposal was to apply the horizontal increase of 10 per cent to all rates for freight of all kinds with some exceptions, throughout the country, and to increase the existing fares of all kinds by 10 per cent, whatever they were, except that no increase in fares was proposed for members of the military or naval forces of the United States traveling on furlough; and except that the increase in fares was not to apply to extra fares on particular trains (248 I. C. C. at page 550).

The nature of the proceeding, and the threatened strike which had precipitated the investigation, and the great expedition of the hearings, briefs and argument precluded anything but a general examination of the revenue needs of the national transportation system.

The Commission's Report, consisting of *80* printed pages, dealt almost incidentally and only generally with passenger fares, in less than 3 of the 80 printed pages (248 I. C. C. at pages 564, 565 and 566). The only specific references to coach fares consisted of very general statements as to what the existing basic fares were in the respective regions. (at page 564)

The Commission said that:

"In coaches, one way, 2 cents per mile in the East and West and *1.5 cents in the South;* round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West, and *1.35 cents in the* South."

Thus different basic and special fares were in effect in different parts of the country.

The 10 per cent order of January 21, 1942.

Just *one week after* the submission of that case, and nearly *six weeks before* the decision in that case, the Commission did a very unusual thing. Without the issuance of any report whatsoever upon the facts of record, the Commission *entered an order* in Ex Parte 148, on January 21, 1942, approving the proposed increase of 10 per cent in all existing fares, whatever they happened to be at the time (Pr. 521).

In its first Report in Ex Parte 148, *Increased Railway Rates, Fares, and Charges,* 1942, 248 I. C. C. 545, the Commission found at page 612, that:

"the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable if passenger fares are increased to the extent already permitted by our order (of January 21, 1942), and if freight rates and charges are increased to the extent indicated below. . ."

The increase permitted in freight rates, etc., with some exceptions was 6 per cent. (at page 612)

The Commission said (at page 613) that:

"The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency." . . .

"Rates and charges increased as herein permitted are not *prescribed* rates and charges within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370."

The Commission's explanation of the 10 per cent order of January 21, 1942.

At page 565 of the Report in Ex Parte 148 the Commission said:

> "In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway-transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful",

and at page 566:

> "We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.
>
> "The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed."

That 10 per cent Order prescribed no fares. It merely permitted an increase of 10 per cent in each existing fare, whatever it happened to be, because of the emergency.

There was no opposition to that 10 per cent Order. The 10 per cent increase was published to apply on all existing coach fares for interstate and intrastate traffic alike.

The sole effect of the 10 per cent Order of January 21, 1942, upon the one-way coach fare of 1.5 cents in the south was to permit it to be increased by 10 per cent to 1.65 cents.

None of the Findings in the *1936 Fares Case* were reconsidered, or reversed, or changed in any respect or in any degree by the 10 per cent Order except that an emergency increase of 10 per cent was permitted, because of the threatened general strike during emergency conditions of war.

In the report in Ex Parte 148 (248 I. C. C. 545) the finding at page 565—that "the proposed increased fares will be reasonable and lawful"—is, in substance and effect, (as applied to the southern basic coach fare of 1.5 cents, in-

creased 10 per cent to 1.65 cents), a finding that the 1.65 cent fare in the south is and "will be reasonable and lawful" as of the date of that decision—March 2, 1942.

As the states of North Carolina, Kentucky, Tennessee and Alabama relied heavily upon the federal Commission's finding in the *1936 Fares Case*, that the coach fare of 1.5 cents in the south was "not unreasonable or otherwise unlawful", so likewise they, after permitting the 10 per cent emergency increase, effective February 10, 1942, relied again upon the federal Commission's finding in Ex Parte 148 that the fare of 1.5 cents, increased by 10 per cent, to 1.65 cents "will be reasonable and lawful" for the future.

July-August 1942.

The railroads' application for authority to increase the interstate coach fare in the south from 1.65 to 2.2 cents.

On July 14, 1942, the railroads in the south, which were maintaining the coach fare of 1.5 cents, increased by 10 per cent to 1.65 cents, filed a separate petition with the federal Commission for authority to publish another such increase to 2.2 cents.

The federal Commission, arbitrarily and unjustly, entered *a hasty order on August 1, 1942* about two weeks after that application had been filed, *granting the Application, without any hearing, without any Report, without any evidence, and without any findings.*

That Application was given a Docket Number of its own but was changed by the Commission to the Ex Parte 148 docket number, but it had no place therein. It was a separate application, raising new issues, not raised in Ex Parte 148, as to a particular fare for a particular service by particular carriers for a particular region, after the nation-wide increase of 10 per cent had been added to the 1.5 cent fare.

The additional increase applied for—from 1.65 cents to 2.2 cents in coach fares—amounted to 33.3 per cent.

Apparently the Number of the Application was changed to Ex Parte 148 as a technical means of avoiding a separate investigation, and to avoid a hearing, and to circumvent the statutory requirement that, at such hearing involving such change in fare, "the burden of proof shall be upon the carriers to show that the proposed change . . . fare . . . is *just and reasonable,*" as provided in Section 15 (7) of the Interstate Commerce Act. (U. S. Code, Title 49, Section 15 (7), 54 Stat. L. 912. See Appendix A to this Brief.)

There is a difference between the Order of January 21, 1942, and the Hasty Order of August 1, 1942 in that the former Order was followed later by confirmatory findings in the main Report in Ex Parte 148 (248 I. C. C. 545) as to the 10 per cent increase whereas there was *no subsequent Report* or findings to buttress the Hasty Order of August 1, 1942, which granted the additional increase of 33.3 per cent from 1.65 to 2.2 cents per mile.

The southern railroads by authority of the Hasty Order, increased their interstate coach fares from 1.65 cents to 2.2 cents, effective October 1, 1942.

The Hasty Order of August 1, 1942 was entered so quickly that *the public had no opportunity to protest, or to be heard* upon the Railroads' Application of July 14, 1942 for an additional increase of 33.3 per cent in coach fares.

The first opportunity afforded the public to voice any objection to such increased fares effective October 1, 1942, was *after* the tariffs had been filed.

Protests and petitions for suspension of the increased southern coach fares were duly made and filed; but the federal Commission arbitrarily *denied* the protests and petitions and permitted the increased coach fares to become effective October 1, 1942, *without any investigation, or hearing, or evidence, or Report.*

At no time prior to the entry of the Hasty Order of August 1, 1942, and the denial of the protests and petitions for suspension of the 33.3 per cent increase in coach fares ef-

fective October 1, 1942 under authority of the Hasty Order, was there any conflict or authority between the federal Commission, the Price Administration and the four State Commissions.

It was the arbitrary act of the federal Commission in entering its Hasty Order and in denying the right to the public, the State Commissions and the Price Administration to be heard with respect to this separate proposal of these certain southern railroads, which precipitated this litigation by the four states and the Price Administration against the federal Commission.

Summary of history of 1.5 cent fare, 1933 to October 1, 1942.

Now let us summarize the history of the coach fares in the south up to that date—October 1, 1942.

The fare of 1.5 cents was found not unreasonable or otherwise unlawful in the *1936 Fares Case*. That fare was subjected to the nationwide horizontal emergency increase of 10 per cent, to 1.65 cents, effective February 10, 1942, which was found to be reasonable and lawful for the future in the First Report in Ex Parte 148.

Without hearing, without evidence, without findings of fact and without Report the federal Commission arbitrarily, by its Hasty Order of August 1, 1942, granted the special application of certain southern railroads permitting that 1.65 cents fare to be increased 33.3 per cent effective October 1, 1942, and the Commission precluded any opportunity to the public to be heard, and denied the protest against that increase and denied the petition to investigate the increase.

Those arbitrary acts precipitated this litigation.

1943.

The Second and Third Reports in Ex Parte 148.

Not in the Second or Third Reports in Ex Parte 148 were any findings of fact set forth which would support the Hasty Order of August 1, 1942 with respect to coach fares in the South.

In the Second Report in Ex Parte 148, *Increased Railway Rates, Fares and Charges*, 1942, 255 I. C. C. 357, submitted February 23, 1943, decided April 6, 1943, the Commission admitted that it had made a mistake in the 1942 Report, and it found that the increases in *freight* rates, established pursuant to its 1942 Report, were unjust and unreasonable "for the remainder of 1943"; and that the freight rates, with the previously authorized increases eliminated "will meet the objectives of the national transportation policy" (255 I. C. C. at pages 393, 394). The Commission further found that:

> "the added revenue resulting from the increases in freight rates and charges authorized in the original report is *not necessary or justified under present conditions.* (p. 394)
>
> "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects". (page 394)
>
> "Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight". (page 394)

After stating what the general bases of current fares were and after discussing commutation fares, the Commission said:

> "We find that no modification of our previous findings, orders, and authorizations respecting the present interstate standard passenger fares is necessary. We further find that the authority heretofore given with respect to the increase in commutation fares should be revoked". (at page 395)

This summary is about all that the Commission said or considered in its second Report of 1943 in Ex Parte 148 with respect to passenger fares.

Attention is directed to the fact that the Second Report in 1943 reversed the First Report in 1942 and eliminated the

horizontal increase in freight rates and charges and commutation fares, and merely left in effect the horizontal increase of 10 per cent on all passenger fares other than commutation. That finding as to passenger fares was wholly negative in form.

The Second Report in 1943 did not set forth any specific findings with respect to pullman fares, or reserved-seat fares, or extra train fares or coach fares, and did not show what effect the "unusually high earnings, resulting from a volume of traffic which is taxing the capacity of all of their facilities, both freight and passenger", (at page 397) had had upon the unit costs in relation to expenses, or what effect the increased volume of traffic and travel and car-occupancy had had upon the relation of coach revenues per car-mile and passenger-mile to coach expenses per car-mile and passenger-mile respectively.

The Commission's only finding of fact, with respect to passenger fares was the finding, in relation to *all* fares, that:

> "as shown by the reports for 1942 and the current reports so far made this year (1943) the operating ratio remains decidedly less favorable for passenger and allied services than for freight". (at page 394. See also page 368)

And even that bare finding, unsupported by any statement of facts, could have related only to the month of January 1943, for the reason that the Second Report was based upon a record which was closed in February 1943, before the February 1943 reports of the carriers were available. And even that bare finding was not true as to the principal North Carolina lines which are under consideration in the North Carolina Case, where the evidence shows that their average passenger operating ratio was lower and more favorable in 1943 than their freight operating ratios.

Attention is directed to the fact that there is nothing in the Second Report for 1943 which condemns in any way

or in any degree the southern fare of 1.5 cents which had been approved by the Commission, which was stoutly advocated by the Southern Railway and others, in the 1936 Fares Case, and which had been increased 10 per cent, under Ex Parte 148.

In other words, the 1936 Fares Case, the 1942 horizontal Increase Case and the 1943 Second Report in the horizontal increase case, leave the 1.5 cent fare in the south, as increased by 10 per cent under Ex Parte 148, heartily approved and sanctioned by the Interstate Commerce Commission; and there is nothing in the 1942 and 1943 Reports in Ex Parte 148 which in any way condemns or reverses the findings in the 1936 Fares Case as to the reasonableness of the 1.5 cent fare as increased 10 per cent under Ex Parte 148, or the finding in the First Report in Ex Parte 148 that the fare of 1.5 cent so increased, would be "just and reasonable for the future".

In the Third Report in Ex Parte 148, *Increased Railway Rates, Fares, and Charges*, 1942, 256 I. C. C. 502, submitted October 30, 1943, decided November 8, 1943, the Commission extended the period of suspension of the Ex Parte 1942 increases from January 1, 1944 to June 30, 1944.

There is no finding whatsoever with respect to passenger fares, or coach fares in that Third Report.

1944.

In the Fourth Report in Ex Parte 148, 258 I. C. C. 455, decided May 12, 1944, the Commission continued the general level of the rates, as they were left by the Third Report.

On October 23, 1944, the Commission began further hearings and argument in Ex Parte 148 to determine whether the horizontal increases on freight charges, which had been suspended, should be permanently cancelled and whether the 10 per cent horizontal increase in passenger fares should be removed permanently. Oral argument was concluded on November 3, 1944.

In the Fifth Report in Ex Parte 148, 259 I. C. C. 159, decided December 12, 1944, the Commission found that a modi-

fication of the previous findings, orders and authorizations with respect to interstate southern passenger fares was not warranted. See pages 186 to 189, 193, 194.

Commutation fares.

In the report on further hearing in Ex Parte 148, 255 I. C. C. 357; the Commission said:

> "The question whether the basic commutation fares should be increased requires further investigation. We therefore shall resume investigation of commutation fares at the stage where this proceeding began, and will invite the cooperation of the regulatory bodies of the states particularly interested, with a view of determining what, if any changes, should be made in these fares. . . ." 255 I. C. C. 357 at page 395.
>
> "We further find that the authority heretofore given with respect to the increase in commutation fares should be revoked, and that the question whether any increase should be made therein, in order to accomplish the purposes of the National transportation policy and the Interstate Commerce Act, should be investigated further by us as respects interstate commutation transportation. In that investigation, which will be independent of the present proceeding, as above indicated, we shall invite the cooperation of the regulatory bodies of the states as concerns their intrastate commutation traffic". 255 I. C. C. at page 395.

Thus the federal Commission did with respect to commutation fares, one type of coach service, what the four Southern state commisisons asked it to do with respect to other coach fares. The federal Commission admitted its mistake, in its first report in Ex Parte 148, in applying the horizontal increase to commutation fares and declined and refused to give the requested separate consideration and treatment of other coach fares of the southern carriers.

Separate investigation of commutation fares was thereafter made in several separate proceedings, such as No. 28991, *Passenger Fares Between District of Columbia and Nearby Virginia*, 256 I. C. C. 769 and 258 I. C. C. 559 on further hearing and reconsideration; No. 28972, *Interstate*

Commutation Fares—New England, which was discontinued on petition of the Boston & Albany, Boston & Maine and New Haven; No. 28974, *Interstate Commutation Fares—Chicago, Ill. District;* No. 28973, *Interstate Commutation Fares—New York;* 28975, and *Interstate Commutation Fares, Philadelphia-Camden District.*

There is no intimation in the Commission's decision in Ex Parte 148 or the interstate commutation fares cases why commutation fares should receive separate and special consideration any more than other coach fares. The commutation fares are on a much lower general level than other coach fares, and therefore the commutation fares do not contribute as much towards the maintenance of the railroads as other coach fares.

In the *1936 Fares Case,* 214 I. C. C. at page 266, the average fare in suburban coaches (commutation) is shown as 1.33 and in other coaches 1.88 cents per passenger mile. The revenue per passenger mile in coaches (other than commutation) for the six North Carolina lines is shown by the railroads to have been 1.56 cents per passenger mile in 1942 (Pr. 328). In the cumulative monthly statement M-220 for December the year 1942 for the Southern Region the revenue for 1942 from commutation passenger traffic is shown to have been 1.12 cents per passenger mile, and the average for the United States for commutation passenger traffic was 1.06 cents per passenger mile.

Why did the Commission reverse itself and require the elimination of the horizontal increase of 10 per cent under Ex Parte 148 from commutation fares, which are so much lower than other coach fares, and fail and refuse to consider or reconsider the reasonableness of the coach fares other than commutation which, in 1942, averaged almost the same as the North Carolina intrastate coach fares of 1.65 cents?

The act of the federal Commission, in making separate and independent investigations into the reasonableness of the commutation fares for travel in coaches, upon the peti-

tions of various railroads, and in failing and refusing to make like separate and independent investigations into other fares for travel in coaches, upon petition of the Southern State Commissions and the Price Administrator was arbitrary.

Short summary of the chronological narrative.

This chronological narrative of the proceedings before the federal Commission with respect to coach fares shows:

That the fare of 1.5 cents in the south was specifically approved and sanctioned as not unreasonable or otherwise unlawful in the past, and as increased 10 per cent to 1.65 cents, is *just and reasonable for the future;*

That the increase of 33.3 per cent in the interstate coach fares in the South was permitted to become effective without any hearing, or finding or Report of the Facts, and without any reversal or modification of those findings in the *1936 Fares Case* and Ex Parte 148; and

That the Unsupported Hasty Order of August 1, 1942, stands squarely in conflict with the extended investigation in the *1936 Fares Case* as modified by 10 per cent and reaffirmed in the Four Reports in Ex Parte 148 through December 1944.

The four State Commissions, having due regard for the interests of the Public and the Price Administration, and respect for due process of law (which seems to have been disregarded and ignored by the federal Commission in entering its Hasty Order of August 1, 1942, and in denying the protests and petitions for suspension) assigned the railroads' like applications for the 33.3 per cent increase in intrastate coach fares for public hearing, in their accustomed manner.

This brings us to the proceeding before the North Carolina Commission.

The case before the North Carolina Commission.

Not until October 12, 1942, 12 days after the 33.3 per cent increase in interstate fares authorized by the Hasty Order of August 1, 1942 had become effective, did the railroads file with the North Carolina Utilities Commission, an application for authority to increase their intrastate fares.

The application was heard before the North Carolina Commission May 20, 1943.

The evidence presented by the carriers was perfunctory. The carriers, then opulent, disavowed any need of revenue, and made no claim of discrimination against interstate commerce. The nature of the evidence presented and points of proof upon which their evidence was lacking, are accurately described in the testimony of Judge Hunter, a member of the North Carolina Commission, in the later Section—13 proceeding I. C. C. No. 29036 before the Interstate Commission, as follows: (Pr. 248)

> "The main issue presented in this case, (before the North Carolina Commission), was whether or not the existing intrastate fare of 1.65 per mile should be increased to 2.2 cents per mile. Some evidence was offered in that case oral in its nature and also considerable testimony in the form of exhibits. The Utilities Commission considered very carefully all of the testimony which was presented on behalf of the petitioners, and it could not find from the testimony facts which would justify the increase of the coach fares to 2.2 cents or to any other figure. In other words, the testimony presented to the Commission at that time was not such that it could make any calculation or arrive at any specific figure which it felt would justify it in fixing the proper rate.
>
> "The testimony as we viewed it justified a figure of 1.65 or lower, just as much as it did any point above that figure."
>
> "I think it probably would add something to an understanding of our position and the order which we made in Docket 2789 to briefly group and number the points which the (North Carolina) Commission con-

sidered and which gave it some concern. These points being briefly these (Pr. 249):

"1. That the cost or statistical evidence was rather limited and general in its nature. It related to south-wide or system operations and not to operations within the State of North Carolina. This was particularly necessary as we viewed the matter in view of the fact that our Commission is limited to the State of North Carolina, and the problem presented before us was a problem of arriving at just and fair and proper charges for operations within the state. (tr. 169-170)

"2. While there was some statistical data with respect to North Carolina, there was no attempt made on the part of petitioners to prove the cost of coach fare service in the State of North Carolina, or for that matter, in any other state.

"3. There was no attempt to determine the cost separately of Pullman car service, or mail service, and express service, troop train service. There was no evidence which tended to show that these classes of services were being operated at fares which would produce net passenger operating losses or gains.

"There was considerable testimony in the hearing before our Commission to the effect that troop train movements were expensive, and just how expensive, we were not advised but left with the impression that they were rather unusually expensive as compared with other types of coach service. Whether or not this class of service bears its proper burden of coach train operations within the State was not developed. In the proceeding before the State Commission there was no issue presented with respect to the fares or charges for troop movement. That is a matter of contract between the federal Government and the railroads. It is a matter that was not presented to us. We did not consider it. (tr. 171)

Pr. 250:

"I may add further that there is no attempt to show that the difference between coach fare service and Pullman service in relation to the difference in cost of these

two classes of service, the difference in charges being considerable.

"The Utilities Commission was not advised of the cost of passenger per coach mile in North Carolina, neither was it advised of the revenue per passenger per coach mile.

"The things I have mentioned are things which did not appear in the testimony, and there there was this thing that did appear quite denitely, that was that the petition was not being based upon a need for added revenue. On the contrary it was not presented as a revenue case and it was so stated, I believe, by the petitioners themselves.

"The evidence indicated that certain of the weak lines were in need of revenue, and probably could have justified an increase in rates on the basis of revenue". (tr. 172-173)

Pr. 248:

"The (North Carolina) Commission, therefore, made its findings of fact, and it issued its order which was *not final* in nature but was in the nature of an *interlocutory order*, and in this order it advised the petitioners that it proposed to petition the Interstate Commerce Commission to make an investigation with respect to interstate rates of carriers involved, interstate rates to and from points in North Carolina and through North Carolina. (tr. 168-169)

"As I say, this order was in the nature of an interlocutory order. Its effect was to defer any ultimate decision in the case until such time as the Interstate Commerce Commission might pass upon its petition and perhaps supply it with what it considered needed information which it did not have.

Pr. 248-249:

"This order of the Utilities Commission did not in any manner close the door to the petitioners. It left it open, and the door, in fact, is still open to them. There was no petition or request or suggestion on the part of the petitioning railroads to reopen the case or to rehear it or to reconsider the findings of fact."

Petitions to the Interstate Commerce Commission to investigate the reasonableness of the interstate fare of 2.2 cents per mile were filed not only by the North Carolina Utilities Commission, but also by the State Commission of Alabama, and by the Office of Price Administration.

All of such petitions to the Interstate Commerce Commission to investigate the interstate coach fares were denied by the Interstate Commerce Commission without any report of its findings or Order, upon which the denial of the Interstate Commerce Commission was based.

Such summary dismissal by the federal Commission of petitions of the two state commissions does not exhibit that spirit of comity and consideration which Congress expects under the provisions of Section 13 (2) of the Interstate Commerce Act.

Subsequently the North Carolina Commission called upon the railroads to furnish data such as the relation of revenue to expenses per passenger mile in coaches, so as to supplement the weak and insufficient evidence which had been presented by the carriers at the hearing before the North Carolina Commission (Pr. 451-510). *This the principal carriers failed to do* (Pr. 510-517 & Pr. 532-544). Thereupon the North Carolina Commission, upon supplemental data, issued another order *permitting certain weak lines*—the Clinchfield and the Norfolk Southern,—*to increase their coach fares*, and refusing again to grant the increase to the four opulent lines, such as the Atlantic Coast Line, the Louisville & Nashville, the Seaboard Air Line and the Southern Railway (Pr. 28).

These are the four carriers whose intrastate coach fares in North Carolina were at issue in the case before the District Court of North Carolina. They will be referred to hereinafter as the North Carolina railroads although they serve some or all of the three other states of Kentucky, Tennessee and Alabama.

The North Carolina Case before the Federal Commission.

The North Carolina railroads, after the interlocutory order of the North Carolina Commission and without filing any petition for further hearing, and without furnishing the supplemental data requested by the North Carolina Commission, filed a Section 13 complaint with the federal Commission seeking its authority to increase their intrastate coach fares in North Carolina (Pr. 121).

The federal Commission on October 13, 1943, then instituted its investigation, No. 29036, to determine whether the refusal of the North Carolina Utilities Commission to authorize or permit the application to the transportation of passengers traveling intrastate in North Carolina of coach fares and charges corresponding to those established for interstate application on October 1, 1942, causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what fares and charges, if any, or what maximum or minimum, or maximum and minimum fares, and charges, shall be prescribed to remove such unlawful advantage, preference, prejudice, or discrimination, if any, as may be found to exist (Pr. 141).

A hearing in the North Carolina Coach Fares Case was held December 28-29, 1943 (Pr. 143).

Description of the types and extent of the evidence in the North Carolina Coach Fares Case before the Federal Commission, I. C. C. No. 29036.

Transportation and traffic evidence.

The railroads, to support their Section 13 complaint against the intrastate coach fares in North Carolina, presented ten witnesses.

Witness Blackwell described the Southern Railway System, and stressed the difficulties and expenses encountered in the movement of troop trains (tr. 16-18) (Pr. 151, 153, 159, 160). The charges for troop train movements are a matter of contract between the carrier and the federal government, and not at issue in that proceeding.

Mr. Blackwell also described civilian train operations (tr. 20-29) (Pr. 152-165).

Witness Barry, A.P.T.M., of the Southern Railway, explained in detail the existing fares, and the history of the fares (tr. 38-45, and Exhibit No. 1) (Pr. 166-179).

He cited instances of intrastate travel and interstate travel, and differences in fares for certain distances, and explained how interstate travelers might defeat interstate fares by purchasing a second ticket for the portion of the journey to a point in North Carolina (Exhibits 2 and 3, tr. 48-49). He expressed the view that the conditions of interstate and intrastate travel are similar (tr. 50), but admitted that the de luxe streamlined fast trains run through the narrow part of North Carolina, from north to south, and not through the long part of the state—from east to west; that the fast through trains on the Southern stop at only six points in North Carolina; and that all trains do not stop at all points in North Carolina (tr. 52-57) (Pr. 176-177).

Mr. Barry admitted that the Southern's experiment in 1933 with the 1.5 cent coach fare so impressed the Southern that it desired to continue it, in order to obtain the greatest gross revenue from passenger traffic. And he admitted that the 1.5 cent fare resulted in substantial increases in passengers and in passenger revenue (tr. 59-60) (Pr. 178-179).

Witness Beuchler, Clerk to the Auditor of the Southern Railway, presented tabulations showing the number of tickets sold at certain origins, so as to establish that from a given point in North Carolina some persons travel to intrastate points and some to interstate points (Ex. 4, tr. 61-66) (Pr. 180-184).

Witness Lynch, G.P.A. of the Atlantic Coast Line Railroad, presented simple comparisons to show the differences between interstate and intrastate fares; (Ex. 5, 7, 8) and the possibility of a traveler selecting an optional intrastate route between two points at lower fare than over an interstate route between the same points; (Ex. 6) but he failed to give the distances via the two routes, so that the comparison is meaningless (tr. 67-73). (Pr. 184-189).

Witness Hanes, an investigator in the law department of the Southern was permitted to testify, over objections, that he had made a "very incomplete investigation" (tr. 76) (Pr. 190) with the assistance of "some half dozen or more of our claim men" (tr. 76) (Pr. 190) and "had gotten a partial list of people who travel interstate into North Carolina for the purpose of selling goods or other business" (tr. 77) (Pr. 190) and who come in competition with concerns that are located in North Carolina (tr. 79) (Pr. 191). But he admitted that his work was carried on in part "over the telephone and I picked up what information I could in the time I had to pick it up in; (tr. 85) (Pr. 195); and that statements which he had made represented oral statements made to him by other unnamed employes of the Southern Railway, that some of it "was in writing" and that "a good deal of it was gathered over the telephone" (tr. 86) (Pr. 196). His admissions show that his testimony was inadmissible. The objections thereto (Pr. 196-198) should have been sustained (tr. 86) (Pr. 189-200).

The railroads' statistical evidence.

Mr. Tassin, General Statistician of the Southern Railway (Pr. 201), presented four large exhibits, 9 to 12, incl. (Pr. 315-382), consisting of some 73 pages of statistical data, which are indicative of the wealth of data available to the railroads. His exhibits show that there has been a vast and complete change since the Report in the *1936 Fares Case*; that the financial conditions of the four North Caro-

lina lines, during the process of change in economic conditions has reached a stage of unprecedented opulence; that there has been a vast increase in earnings from passenger traffic and a sharp drop in passenger operating ratios; and that the car-occupancy, particularly in coaches has multiplied several times over the 1936 average. In fact, Mr. Tassin's exhibits prove almost everything that was essential to warrant a denial of the four railroads' proposed increase in coach fares except the most important single factor—viz., the current expense per passenger-mile in coaches. The omission of that item from this wealth of data is glaringly conspicuous.

Mr. Tassin's Exhibit 9, page 4, shows the estimated amounts of increased revenue which would have been collected from North Carolina intrastate travelers if the proposed increased fares had been in effect during three respective periods. The figure for the year ended September 30, 1943 is $566,823 (Pr. 317).

The huge increase in net passenger operating income.

Exhibit 9, page 5, shows that the net railway operating income from passenger traffic changed from an average deficit of $10,272,080 for the seven years, 1936 to 1942 inclusive, of six North Carolina railroads, including the Clinchfield and the Norfolk Southern to a profit of $26,699,988 in 1942 (Pr. 318). In 1942 the four roads, A. C. L., L. & N., S. A. L. and Southern, earned large profits from their passenger traffic. The aggregate profit of the six roads of $26,699,988 included the deficits of the Clinchfield and the Norfolk Southern, which should be excluded for the reason that the North Carolina Commission permitted the increases in their coach fares.

The huge increase in net income on all traffic.

Exhibit 9, page 6, shows that the class i railways in the southern region (not including the rich Pocahontas lines) earned in the aggregate from all operations, a net income

after taxes of $10,743,969 in 1936—the year of the Report in the *1936 Fares Case*, when the coach fare of 1.5 cents was found not unreasonable by the federal Commission. The net income increased to $74,845,799 in 1941 and the 1941 figure was more than doubled in 1942 to $153,250,208. That net income for 1942 was left after setting aside $214,151,928 for payment of taxes (Pr. 319).

High rate of return.

Page 6 also shows that even computing the rate of return on investment *after* taxes, the average rate of return of all class I carriers in the Southern Region for 1942 was 6.41 per cent (Pr. 319). And this excessive rate of return after taxes was earned when the taxes for 1942 were 5.24 times the taxes for 1936. These figures include the weak lines with the strong. Page 6 does not show the rate of return *before* taxes. (See Exhibit 20—described later—for the rates of return *before* federal income and excess profits taxes for the North Carolina roads.)

The rate of return, 6.41 per cent, is based upon investment in railway property plus cash for working capital and supplies without any deduction for depreciation. If depreciation had been deducted from investment, the rate of return, even after taxes, would have been considerably in excess of 6.41 per cent.

The showing of these facts by Mr. Tassin is conclusive evidence against the carriers' assertion that they need additional revenue.

The striking improvement in passenger operating ratios.

Exhibit 9, page 11 (Pr. 324), compares the freight and passenger operating ratios of six North Carolina lines for the separate years, 1936 to 1942 inclusive. Here again is conclusive evidence of the vast change in conditions, particularly with respect to the vast improvement in the relation of passenger revenues to passenger expenses.

The passenger operating ratio of the A. C. L. dropped from 108 in 1936 to 64 in 1942. The ratio of the Seaboard dropped from 138 to 60; and the ratio of the Southern dropped from 112 in 1936 to 57 in 1942 (Pr. 324).

The improvement in the freight operating ratios was substantial, but far less striking. Comparing 1936 with 1942, the freight ratios were: the A. C. L.'s 67 in 1936 dropped to 51 in 1942; the S. A. L.'s 70 in 1936 dropped to 61 in 1942; the Southern's 62 dropped to 55 in 1942 (Pr. 324).

Especially striking is the fact that the passenger operating ratio of the S. A. L. had dropped to 60 in 1942 which was a point *below* the *freight* operating ratio of 61 in 1942. This means that in 1942 the Seaboard earned *more* money per dollar of expense from its *passenger* traffic than from its *freight* traffic.

The heavy increase in car mile passenger revenues of all types.

Exhibit 9, page 13 (Pr. 326), shows that the revenue per passenger carrying car-mile for coach, sleeping car, parlor and chair car, other passenger revenue and dining and buffet car service of ten North Carolina roads in 1942 was 40.49 cents, and *more than double* their average revenue per passenger carrying car-mile of 15.37 cents for 1936 (Pr. 326). Here again is conclusive evidence of the vastly changed conditions, as reflected in the sharp increase in passenger car mile revenues and car-occupancy.

On the other hand, there was almost no change in the revenue per car-mile derived from other non-passenger carrying cars in passenger trains, namely, baggage, mail, express and milk, as shown on page 14, Exhibit 9 (Pr. 327). The average revenue of ten North Carolina roads from this class of traffic in passenger trains was 25.76 cents per car-mile in 1936 and 25.92 cents in 1942 (Pr. 327). Considered in connection with page 13, this data shows that the vast drop in passenger operating ratios, in 1942 as compared with 1936, was due to increased number of revenue passen-

gers in passenger carrying cars, and not to any increase in baggage, mail, express and milk traffic in passenger trains.

Revenue per passenger-mile.

Page 15 of Exhibit 9 (Pr. 328) shows that the increase in passenger earnings, and drop in passenger operating ratio, 1942, as compared with 1937, was not due to any marked change in the fares, as expressed in average revenue per passenger mile in coaches, other than commutation. The average of 6 North Carolina lines in 1937 was 1.494 cents and, in 1942, 1.56 cents per passenger per mile in coaches (other than commutation).

Page 16 of Exhibit 9 (Pr. 328) shows that the revenue of five North Carolina roads per passenger mile in *parlor and sleeping* cars in 1937 averaged 2.286 cents, which is the approximate equivalent of their interstate *coach* fare of 2.2 cents, which was permitted to become effective on October 1, 1942, without any findings or Report. And even in 1942 the average revenue per passenger-mile in parlor and sleeping cars of five North Carolina roads, was not 3.3 cents, but 2.694 cents (Pr. 328). Those average fares in 1942 of 1.56 cents for coaches and 2.694 cents in parlor and sleeping cars were in effect when the four North Carolina roads experienced such low and greatly improved passenger operating ratios, and such high net revenues from passenger operations.

The high increase in passenger earnings was due primarily to the very large increase in car-occupancy in coaches.

Page 17 of Exhibit 9 (Pr. 329) shows that this vast improvement in passenger earnings was derived principally from coach traffic. The revenue per coach-mile (other than commutation) of six North Carolina roads averaged 22.02 cents in 1937 and 52.44 cents in 1942, an increase of 138 per cent. Since there was practically no change in fares

other than the 10 per cent horizontal increase under Ex Parte 148 in February, 1942, it is plain that this increase of 138 per cent in revenue per coach-mile, 1942 over 1937, was due to vastly increased coach-occupancy, or number of passengers per coach. This is demonstrated on page 31 of Mr. Tassin's Exhibit 9 (Pr. 341), which shows that the passenger miles per coach-mile of the six North Carolina roads increased from an average of 14.74 passengers per coach in 1937 to 33.62 in 1942 and 44.96 for January-July, 1942.

The fact that the greatly increased earnings on passenger traffic were due primarily to the increased occupancy of coaches is supported further by page 18 of Exhibit 9 (Pr. 329), which shows that the average revenue per sleeping and parlor car mile of five North Carolina roads in 1942 was 52.4 cents, which is practically the same as the revenue per *coach* mile of 52.44 for the six North Carolina roads as shown on page 17 (Pr. 329).

In the *1936 Fares Case*, it will be recalled, the Commission found that, due to the much heavier weight of the pullman car than the coach, the cost per pullman-mile is greater than the cost per coach-mile. Therefore, these two pages, 17 and 18 (Pr. 329), show conclusively that the coach passengers per coach at 1.65 cents per mile in North Carolina were paying much more than their share of the large passenger profits and relatively more than the pullman passengers per pullman at 3.3 cents per mile. Stated in another manner, these pages show that the spread between the intrastate coach fare of 1.65 cents and the pullman fare of 3.3 cents in 1942 was entirely too small and that it was the coach traveler who was paying too much at 1.65 cents per mile.

Tax accruals.

Page 19 of Exhibit 9 (Pr. 330) shows the tax accruals of eleven North Carolina roads by years, 1936 to 1942, inclusive. Their aggregate tax accruals for 1942 are shown to have been 607 per cent of those for 1936. The largest year-

to-year increase occurred in 1942 over 1941. The accruals for 1942 were $126,068,803, or nearly three times the figure for 1941 of $47,227,889 (Pr. 330). In view of that heavy increase in 1942 it is all the more remarkable that the carriers earned a higher rate of return after taxes in 1942 than in 1941, and the passenger operating ratio was better (lower) in 1942 than in 1941. The returns of the Class I roads in the Southern region were 6.41 per cent for 1942 and 4.24 per cent for 1941, after federal income and excess profits taxes (Pr. 319).

Increases in hourly wages.

Page 21 of Exhibit 9 (Pr. 332) shows that the hourly compensation of all employees of eleven railroads operating in North Carolina increased 37 per cent, 1942 over 1936. That increase pales into insignificance in comparison with the tremendous increase in passenger net railway operating income for six North Carolina roads shown on page 5 (Pr. 318) from a deficit of $16,426,832 for 1936 to a profit of $26,699,988 for 1942, which takes into consideration increases in wages and all other items of expense.

The net railway operating income of the class I roads in the southern region in 1942, $214,151,928, was about 267 per cent of the figure for 1936, as shown on page 6 of Exhibit 9 (Pr. 319).

Page 22 of Exhibit 9 (Pr. 332) shows that the index of average unit prices of railway materials and supplies including fuel in the Southern Region advanced from 100 in October 1936 to 154 in December 1942. These increases, like those in wages, were far more than overcome by increased traffic, and revenues; and the high increase in net railway operating income, 1942 over 1936, was accomplished notwithstanding the increase in wages and the price of materials. Page 22 (Pr. 332) also shows that the price index of 154 in December 1942 went down to 140 in June 1943.

The heavy increase in passengers per train-mile.

Pages 23 to 26, inclusive, of Exhibit 9 (Pr. 333-336) show revenue passenger miles per train mile of numerous North Carolina roads for the years 1916 to 1942, inclusive, and for January-July, 1943.

The average of the six roads for 1932 was 23.83 passengers, for 1936 was 44.59 passengers and for 1942, 145.85. For January-July, 1943, the average jumped way up to 211.1 passengers, or nearly five times as many passenger miles per train mile in the first 7 months of 1943 as in 1936, and nearly nine times as many as in 1932.

The heavy increases in passenger-miles per car-mile.

Exhibit 9, pages 27 to 30, inclusive (Pr. 337-340) show the number of passenger miles per car mile of eleven roads in North Carolina from 1916 to 1942, inclusive, and the first seven months of 1943.

The average for the six roads in 1932 was 5.89 passengers, in 1936 was 10.31 passengers, in 1942, 23.17 passengers, and in January-July 1943, 30.95 passenger miles per car mile.

This means that there were about five times as many passengers per car in 1943 as in 1932 and three times as many in 1943 as in 1936. This included all types of passenger cars, and mixed and special; and indicates the heavy increase in car-occupancy of all types of passenger cars.

The heaviest increase in car-occupancy was in coaches.

Page 31 of Exhibit 9 (Pr. 341) shows that the passenger miles per coach mile of the six North Carolina roads averaged 14.74 in 1937 and 33.62 in 1942, and 44.96 in January-July 1943. The coach occupancy in 1943 was a little more than three times the coach-occupancy in 1937.

Not only the number of passengers but also the percentage increase was far greater for coaches than for sleeping and parlor cars, as shown by page 32 of Exhibit 9 (Pr. 342). The car occupancy of the pullmans in 1937 of five

North Carolina roads averaged 9.82 and in January-July 1943, 23.06 travelers. The increase in passengers in pullmans was about 135 per cent. The increase in coach occupancy was about 205 per cent.

In view of the Commission's finding in the *1936 Fares Case* that an increase in car-occupancy of less than 1 person would have wiped out the passenger deficit in the East, it is apparent that the increase in car-occupancy of 136 per cent in pullmans and 205 per cent in coaches accounts for the drastic drop in the passenger operating ratios of the North Carolina lines, and in the heavy increases in the passenger net railway operating income.

The increase in car-occupancy in pullmans 1943 over 1942, was heavy; and in coaches, very heavy.

Another important fact is developed by pages 31 and 32 of Exhibit No. 9. The carriers in their statistical data have gone beyond 1942 as to some types of information, and have stopped short with 1942 as to other types of statistics. Their contentions and premises are founded primarily upon the year 1942, averaged in with numerous preceding years. A glance at the last vertical columns of pages 31 and 32 (Pr. 341, 342) will show how great an improvement there was in the first half of 1943 over 1942 in car-occupancy. The average passenger mile per coach mile of six North Carolina roads in 1942 was 33.62, and in January-July 1943, 44.96; and the average in pullmans was 19.45 in 1942 and 23.06 in January-July 1943. The increase in coaches, 1943 over 1942 was about 33 per cent, and the increase in pullmans, 1943 over 1942 was about 19 per cent.

The carriers' Exhibit 9 fails to show the most important factor of all—the expense per passenger mile in coaches.

Mr. Tassin's Exhibit 9 (Pr. 314-341) is a splendid document, illuminating in detail, and thorough in its analysis of the statistics which have a bearing upon passenger fares.

And Exhibit 9 is *almost* complete. It leads us right up to the final step of showing the relation of coach fares to expenses per passenger-mile in coaches in 1942, and stops short. We may be sure that Exhibit 9 would have been made complete, by showing the relation of the carriers' proposed increased coach fares to the expense per passenger-mile, if the showing would have been advantageous to the carriers. The fact that this last and final step does not appear in Exhibit 9 points very directly to the assumption that the reason why Exhibit 9 does not show this last step is because the greatly increased occupancy of coaches has so reduced the expense per passenger mile that the expense is now substantially less than the coach fare of 1.65 cents.

Now let us spell out a few figures by simple arithmetic using the railroads Exhibit 9, to indicate how greatly the increased occupancy of coaches has reduced the unit expense per passenger per mile.

In the *1936 Fares Case* the Commission found (214 I. C. C. page 216) that for the year 1933 in the Southern district, the expense per passenger mile in coaches other than suburban was 3.25 cents, and that the car occupancy in coaches was 8.3 passengers; and that the expense per coach mile was 26.95 cents (214 I. C. C. page 266, Appendix I, table 2.). The expense per coach mile, 26.95, divided by the number of passengers per coach, 8.3, produced the expense of 3.25 cents per passenger mile in coaches. As indicative of the increase in expenses, 1942 over that period, let us take the increase in wages of 37 per cent from page 21 of Exhibit 9, which is probably an overstatement and apply that to the expense per coach-mile in 1933 to arrive at an approximation of the expense in 1942. The expense per coach mile, 26.95, increased by 37 per cent, equals 36.9 cents. Dividing that by the number of passengers per coach, in 1942, 33.63, gives an expense per passenger mile in coaches of 1.10 cents.

Obviously the carriers could not afford to show the expense per passenger mile in view of the heavy increase in

coach occupancy, and therefore, they omitted the expense from Exhibit 9—and that figure was the most important of all to complete the otherwise complete showing which was presented in Exhibit 9.

If we divide the expense, 36.9 cents by the number of coach passengers in January-July, as shown on page 31 of Exhibit 9, 44.96, we arrive at an expense per passenger-mile of 0.82 cents, as compared with the proposed fare of 2.2 cents. How could the carriers justify an increase from 1.65 cents to 2.2 cents when the expense was running say from 0.82 to 1.09 cents?

The carriers' Exhibit 9 provides other data from which the approximate expense per passenger mile in coaches may be readily ascertained by simple arithmetic.

Notwithstanding the absence of any showing in Exhibit 9 (Pr. 315-342) of the expense per passenger mile in coaches, there are data in the Exhibit from which an approximation of the expense can be ascertained by simple arithmetic.

Exhibit 9, page 17, (Pr. 329) shows that the average revenue per coach mile of the six North Carolina roads for 1942 was 52.44 cents. Page 11, (Pr. 324) shows that their passenger operating ratios for 1942 averaged 63.

Multiplying that revenue of 52.44 cents by 63 gives an expense per coach mile of 33.03 cents.

Page 31, (Pr. 341) shows that the coach occupancy of the six roads for 1942 averaged 33.62, and for January-July 1943, 44.96.

Dividing the expense per coach mile of 33.03 cents by the number of passenger miles per coach, 33.62 in 1942, gives an expense per passenger mile in coaches for 1942 of 0.98 cents. That is way below the then existing intrastate fare of 1.65 cents and the then proposed fare of 2.2 cents.

Dividing the expense of 33.03 cents per coach mile by the coach occupancy of January-July 1943, 44.96, gives an expense per passenger-mile in coaches, for the first 7 months of 1943, of 0.73 cents.

It will be noted that there is only a slight difference in the results of the two simple methods of ascertaining the expense per passenger mile in coaches, whether we expand the known 1936 expense per coach mile by the known increase in wages, as representing increased expenses in 1942, which produces an expense per passenger mile of 1.10 cents, or whether we multiply the known 1942 revenue per coach mile by the known passenger operating ratio to get the expense per passenger mile of 0.98 cents. For 1943, the first method produces 0.82 cents and the second method produces 0.73 cents.

The results of the two methods in 1943 are only nine-hundreths of one cent apart—a negligible difference.

These examples in simple arithmetic make it plain why the railroads could not afford, in their Exhibit 9 to show that the expense per coach-mile in 1942 was only 0.98 to 1.09 cents and in 1943, only 73 hundredths to 82 hundredths of one cent, when they were proposing an increase in fares from 1.65 cents to 2.2 cents.

In the railroads' testimony there is no explanation by them why they failed to show the expense per passenger-mile in coaches. The answer is that the expense had dropped from 3.25 cents in 1936 to about 1 cent in 1942 and to less than 1 cent in 1943, due to the greatly increased occupancy of coaches.

Their failure to show the expense per coach passenger-mile is "evidence of the strongest character against them" that the expense is less than one cent and less than half of the fare of 2.2 cents which the federal Commission prescribed as a minimum reasonable fare in the four southern States.

The four North Carolina roads could well afford to make their basic interstate coach fares 1.65, rather than increase the intrastate rates to 2.2 cents.

Mr. Tassin's Exhibit No. 10 (Pr. 342-344) purports to be a "comparative statement of losses". (page 1) The word "losses" is a misnomer. On page 2 he shows what the increased revenue would have amounted to, to 22 respective railroads in the south, in each of the four respective States of Alabama, Kentuck Tennessee and North Caroline for the year December 1, 1942, to November 30, 1943, if the intrastate coach fare had been increased to the interstate basis. The total shown for the 22 roads in four states is $2,420,035. (Pr. 343.)

One page 3, (Pr. 344) he shows what the reduction in passenger revenues would have amounted to for the year December 1, 1942 to November 30, 1943, if the interstate fares had been reduced to the intrastate basis on the respective lines of the Southern Railway System in all of the thirteen states in which its lines operate. Mr. Tassin estimated the "system loss" to be 25 per cent. His use of the word "loss" is a misnomer. What he means is that the swollen and excess profits of the Southern Railway lines would have been reduced by so much. He fails to complete the showing by estimating how much the reduction in profits would have reduced their federal income and excess profits taxes.

The testimony of Mr. Anderson, (Pr. 232) of the A. C. L. and Mr. King of the S. A. L. (Pr. 234) indicated clearly that those lines would be in the 81 per cent to 90 per cent income and excess profits tax bracket in 1943. Therefore, the reduction of 25 per cent in profits, shown by Mr. Tassin, would in all probability represent a tax reduction amounting to about 90 per cent of his estimated reduction in fares to the intrastate basis. Thus the reduction in net income would have been only about one-tenth of the estimated reduction in revenue. The opulent North Carolina lines well could have afforded to reduce their interstate coach fares

to 1.65 cents, without impairing their excessive earnings, and still earned in excess of a fair return, as shown in the testimony for the Price Administrator (Pr. 564).

The Southern roads experienced heavy increases in passenger revenues in 1943 over those in 1942.

Mr. Tassin's Exhibit No. 11 shows, (Pr. 345) for sixteen southern railroads, the percentage increases in freight revenue in 1942 over 1941, and in each of the first 10 months in 1943 over the same months separately in 1942; and like percentage increases in passenger revenue.

Page 6 shows that the A. C. L.'s freight revenue increased 91.4 per cent in 1942 over 1941; and that its passenger revenue for 1942 increased 153.27 per cent over 1941. (Pr. 350)

The exhibit does not add up each of the 10 months of 1943, as compared with the same months of 1942, but it shows that there were very heavy increases both in freight and in passenger revenues in the first 10 months of 1943 over 1942. Here again, the increases in passenger revenues were relatively much greater than the increases in freight revenue. To illustrate, taking July, a month after the 6 per cent horizontal increase in freight rates had been eliminated, the increase in freight revenue, 1943 over the same month of 1942 was 18.41 per cent, and the increase in passenger revenue for that month of 1943, over the same month of 1942 was 78.41 per cent. July was not the month of the highest or the lowest percentage increase in 1943 over 1942 either in freight revenue or passenger revenue. The increases in passenger revenues, month over month, ranged from a high of 121.19 per cent in January to 31.19 per cent in October. This does not mean that October was a small month in 1943. The passenger revenues in October 1943 were substantially greater than in January 1943 or February 1943.

Page 13 of Exhibit 11 (Pr. 357) shows that the L. & N.'s passenger revenue in December 1942 increased 176.11 per

cent over December 1941; and shows increases ranging from 51.61 per cent to 215.88 per cent in passenger revenue in the first 10 months of 1943 over the same respective months of the preceding year—1942.

These showings, as to the A. C. L. and the L. & N. illustrate why many of Mr. Tassin's computations in Exhibit 9 stop with the year 1942. The statistics for the year 1943 made far too prosperous a showing to be presented in any attempt to justify an increase in passenger fares.

Page 17 of Exhibit 11 (Pr. 361) shows like extreme increases in passenger revenues of the S. A. L. 1942 over the year 1941, and for each of the first ten months of 1943 over the same respective months of the year 1942. The increase, December 1942 over December 1941 was 153.82 per cent, and for the 10 separate months of 1943 over the same respective months of 1942 ranged from 20.17 per cent to 114.4 per cent.

Page 18 of Exhibit 11 (Pr. 362) is a like showing for the Southern Railway Company. Its freight increase December 1942 over December 1941 was 31.34 per cent; and its corresponding passenger increase 171.5 per cent. For each of the first 10 months of 1943 it experienced healthy and extreme increases in passenger revenue over the same respective months of 1942 ranging from 24.45 per cent to 189.67 per cent.

The fact that the percentage of increase in October 1943 over October 1942 was next to the lowest of any of the ten months, does not mean that October 1943 was a small month. The passenger revenues in October 1943 of the Southern Railway were greater than in the months of January, February, March, April or September, 1943.

As shown hereinbefore, the increased revenues from coach traffic were much greater than from other forms of passenger traffic, while the revenues from other traffic handled in passenger trains, such as mail, milk and express, remained almost stationary.

These showings in Exhibit 11, (Pr. 345-363) of the extreme increases in passenger revenues in the first 10 months of 1943 over the like months of 1942—present a different picture from the implications of the finding in the federal Commission's Report. (258 I. C. C. at page 140) that:

> "The monthly increases over the corresponding month of the preceding year in the passenger revenues of the railroads of the country, including those in the Southern region *have been quite steadily declining.*"

Exhibit 11 (Pr. 345-363) shows that the passenger revenues of the four North Carolina roads increased greatly in each of the first 10 months of 1943 over the corresponding month of 1942.

The railroads' revenues increased much more than their expenses.

Mr. Tassin's Exhibit 12 (Pr. 364-382) is an illuminating one in that it directly refutes the implication in the federal Commission's report that the year 1942 marked the peak of railroad prosperity and that in 1943 the railroad prosperity was declining month by month.

Exhibit 12 shows for 16 respective railroads in the south the relation between the increased total operating revenues 1942 over 1941, and the increased total operating expenses, 1942 over 1941, and similar comparisons for the first 10 respective months of 1943 over 1942.

A. C. L.

Page 6 of Exhibit 12 (Pr. 369) shows that the A. C. L.'s total operating revenues, December 1942 over December 1941, increased 97.29 per cent, whereas the increase in total operating expenses was only 26.96 per cent. And for each of the first 8 months of 1943 except May the revenues increased at higher percentages than the expenses. In May and September the actual mony-increase in revenue exceeded the actual money increase in expenses. Only in Oc-

tober of 1943 did the actual money increase in expenses exceed the actual money increase in revenues. *But* the Revenues in October 1943, $11,478,160, vastly exceeded the expenses of $6,834,586. And the revenues in October 1943 actually exceeded the revenues in September, 1943.

L. & N.

Page 13 of Exhibit 12 (Pr. 376) shows that the L. & N.'s total operating revenues, December 1942 over December 1941, increased 49.51 per cent, whereas its total operating expenses increased only 23.5 per cent. For each of the first seven months of 1943, through July, the percentage increase in revenues was greater than the percentage increase in operating expenses. In each of the three later months the actual money-increase in revenues was greater than the actual money-increase in expenses.

S. A. L.

Page 17 of Exhibit 12 (Pr. 380) shows that the Seaboard Air Line Railway's operating revenue for December 1942 over December 1941 increased 74.5 per cent, while its expenses increased only 54.19 per cent. For each of the months of January to June 1943 the percentage increases in revenue over the corresponding months of 1942 were greater than the percentage increases in expenses. For July, August, September and October the actual money increase in revenue ran close to the actual money increase in expenses, *but* the revenues in October 1943 were $11,240,211, and the expenses in October were only $6,368,794. The ratio of expense to revenue even in October was as 57 is to 100. In other words, out of each dollar of revenue only 57 cents was needed for expenses.

SOUTHERN RY.

Page 18 of Exhibit 12 (Pr. 381) shows like comparisons for the Southern Railway. Its total operating revenues increased, December 1942 over December 1941 by 48.36 per

cent, whereas its total operating expenses increased only 7.63 per cent.

For each of the months of 1943 through August its percentage increase, 1943 over 1942 was greater in revenues than in expenses. In September the actual money increase in revenue was greater than in expenses, and in October alone did the increase in expenses slightly exceed the increase in revenues. But even in October 1943 the revenues, $20,602,113, were tremendous in relation to the expenses, $11,896,832. The resulting ratio of expenses to revenue is 58. Out of each dollar of revenue only 58 cents was needed for operating expenses for total operations.

The showing made by Mr. Tassin's Exhibits 9 to 12 (Pr. 315-382) of over prosperity of the railroads in 1942, augmented in 1943, is conclusive proof that the railroads *do not need* additional revenue, either from passenger operations, or from over-all or total operations. The statistics presented by Mr. Tassin for the railroads directly refute the finding of the Commission,—that an increase in intrastate fares is "required by respondent carriers to enable them to provide adequate and efficient transportation service, both interstate and intrastate", (258 I. C. C. at page 154).

Witness Anderson, Comptroller of the A. C. L. Railroad, testified that the A. C. L. is paying excess profits taxes; that it was in the 90 per cent bracket for the year 1942, but was able to take advantage of debt retirement and bring it down to 81 per cent. For 1942 it paid federal income tax of $21,600,000 and for 1943 it will run in the neighborhood of fifty-three to fifty-five millions of dollars, all of which, in excess of thirty million, will be excess profits taxes. (tr. 143-144) (*Pr. 232-234*)

He further testified that if the A. C. L. had had the additional revenue from North Carolina Intrastate fares, which is shown on Mr. Tassin's exhibit 10 page 2, to be about $93,084, between 80 per cent and 90 per cent of it would have been paid to the federal government. (tr. 145-146). (*Pr. 234*)

Witness King, statistician for the Seaboard Air Line Railway, testified that the Seaboard in 1943 through the month of November, had accrued federal income, surtax and excess profits taxes of $14,300,000 (tr. 147) and that the Seaboard for 1943 will be in the 90 per cent bracket, but has losses which will permit a postwar refund of 10 per cent, so that the tax accruals are based on 81 per cent. (tr. 159, 160) (*Pr. 234-236*)

Mr. Tassin's Exhibit 10, page 2, (*Pr. 343*) shows that the estimated difference in fares collected by the Seaboard in North Carolina, if the intrastate had been the same as the interstate fares, would have amounted only to $76,548. (*Pr. 343*)

For the L. & N. the amount of the difference is shown as only $24, which is negligible (Pr. 343). The amount of the difference to the Southern Railway is shown as $381,564, so that the Southern is the only one of the four roads which has any substantial interest in the outcome of this proceeding. And the showing that these North Carolina roads are in the highest excess profits tax brackets makes it apparent that 81 per cent to 90 per cent of increased revenue from an increase in North Carolina fares, which they were seeking, went to pay increased federal excess profits taxes.

Railroads are "inappropriate mediums" for the collection of additional excess profits taxes.

An increase in fares to augment federal excess profits taxes should be condemned—not required—by the federal Commission. Increased fares for such purposes lead to improvident and unnecessary spending. In *Increased Railway Rates, Fares and Charges*, 1942, 255 I. C. C. 357 (report on further hearing April 6, 1943) at page 403 Commissioner Joseph B. Eastman in a concurring opinion said:

> "The matter has another aspect, not so fundamental but yet of importance. A considerable number of the railroads are now paying in large amounts, not only

income taxes, but also *excess profits taxes.* Public utility corporations are surely *inappropriate mediums* for collecting taxes of this character from the public which they serve. The fact that such taxes are collectible is always an incentive, also, to improvident or unnecessary spending".

The taxing power rests with Congress, Congress has not delegated the taxing power to the Interstate Commerce Commission. The Interstate Commerce Commission has no legislative or extra judicial power to issue an order commanding the railroads to increase any fares in order that $10 additional revenue may go into the coffers of the railroads for the purpose of paying $9 excess profits taxes to the federal government.

Witness Makinson, General Passenger Agent of the Seaboard Air Line Railway, testified (Pr. 236) that in 1933 the Seaboard began its modernization program of air conditioning and putting reclining seats in coaches; and that there is no difference in the equipment of the *through* trains, interstate and intrastate. (tr. 149) But the later testimony of Inspectors Bowman and Wade shows that intrastate passengers cannot buy tickets on these "through" trains with air-conditioning, and reclining seats, which are reserved. (tr. 205 to 215) (Pr. 270-278)

Mr. Makinson dwelt at length upon the fact that the handling of troop trains is "very expensive and more expensive than the operation of regular daily trains"; that the Seaboard has a large number of military camps on its lines; and that the *"loaded movements of military trains are very remunerative."* (tr. 150) (Pr. 237)

Mr. Makinson's Exhibit 13, page 1, (Pr. 383) illustrates how "it is possible" for passengers to defeat the through published interstate fares by buying a ticket from Raleigh to Monroe, N. C., and another from Monroe to Atlanta, to save 80 cents. Page 2 (Pr. 383) is a similar illustration, and page 3 (Pr. 384) is a simple illustration of the difference between interstate and intrastate fares. (tr. 151, 153)

But the later testimony of Inspector Bowman (Exhibit 18, page 2) (Pr. 398) shows that the Seaboard's Agent at Selma told him that he could not purchase a ticket from Selma to Hot Springs, N. C., and another ticket to Harriman, Tenn., at less than the through interstate fare.

This conforms to Mr. Makinson's testimony that his general office "issued a specific letter to all interline ticket agents, reminding them that it was unlawful to assist a passenger in defeating a through fare by assisting him in making computations and reservations on reserved seat trains and pullman trains". (tr. 152-193) (Pr. 238-239)

Mr. Makinson further testified that there is no land grant mileage on any of the railroads in North Carolina; and that the land-grant deductions would affect only interstate and not intrastate travel. (tr. 164) (Pr. 245)

Witness Barry then furnished a list of tariff references and references to the Official Guide for distances. (tr. 166-167) (Pr. 246)

The railroads failed to meet the burden of proof.

This concluded the railroads' testimony in justification of the proposed 33.3 per cent increase in intrastate fares in North Carolina, over and above the horizontal increase of 10 per cent under I. C. C. Ex Parte No. 148.

No attempt was made by the railroads to prove the expense of coach service. No interstate traveler appeared or testified that the intrastate fares were prejudicial, or discriminatory. No attempt was made to show that the four North Carolina roads are in need of additional revenue. No testimony was offered to show that an increase in fares was needed to enable the four roads to "provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service," as provided in Section 15a(2) of the Interstate Commerce Act. (Appendix A to this brief.)

No proof was presented to justify an increase of 33.3 per cent in the intrastate coach fares, which had been found to

be "not unreasonable or otherwise unlawful" in the 1936 Fares Case and, as increased 10 per cent, "just and reasonable for the future" in Ex Parte 148—(the 1942 nationwide horizontal increase case.)

In these substantial respects the railroads failed to meet the statutory burden of justifying their proposed increase of 33.3 per cent in coach fares in North Carolina. And yet the federal Commission failed and refused to find that the burden was upon the railroads and failed and refused to find that that burden of proof had not been sustained.

The evidence of North Carolina, the traveling public and the Price Administrator in opposition to the proposed 33.3 per cent increase in intrastate coach fares.

The evidence presented by and on behalf of the State of North Carolina, the Charlotte Shippers and Manufacturers Association, the North Carolina Division of the Travelers Protective Association of America and the Price Administrator was directed towards the following major concepts:

We proved that the railroads, in the proceeding upon their application before the North Carolina Commission, had made only a desultory and perfunctory sort of showing, which was wholly deficient, in several primary factors.

We presented certain supplemental statistics to round out those presented by Mr. Tassin for the railroads;

We proved that typical coach travel in North Carolina is in slow trains, in antiquated, uncomfortable and overcrowded coaches and that travel in de luxe air-conditioned coaches, with soft, reclining reserved seats on fast streamlined trains was practically prohibited to North Carolina intrastate travelers; and

We proved that the North Carolina roads, seeking the increase, excluding the weak lines, such as the Clinchfield and the Norfolk Southern, were experiencing unusually low freight operating ratios, and strikingly low passenger operating ratios, which yield them exhorbitantly excessive rates of return on carrier property before federal income

taxes, and excessive rates of return even after federal income and excess profits taxes.

No direct evidence having been presented by the railroads to justify the intrinsic reasonableness of the proposed increased civilian coach fares, other than a mere comparison of the interstate rates with the intrastate rates, which is insufficient (*Florida* v. *U. S.*, 282 U. S. 194, 212), and when the statutory burden of proof was upon the railroads, there was no obligation or burden upon the North Carolina protestants to bring forward any proof bearing upon the intrinsic reasonableness of the then existing coach fares of 1.5 and 1.65 cents which the federal Commission had approved as "not unreasonable or otherwise unlawful" in the *1936 Fares Case*, and, as increased 10 per cent in Ex Parte 148, had been found to be "just and reasonable for the future."

The evidence of the North Carolina protestants went just as far as the exigencies of the situation, and the lack of proof by the railroads, required.

Our evidence proves what we set out to prove; and no evidence was thereafter presented by the railroads to refute the showing made by the North Carolina protestants.

Description of the evidence presented by the North Carolina witnesses.

Judge Fred C. Hunter, an Ex-judge, an eminent member of the bar of North Carolina, and a member of the North Carolina Utilities Commission, described the proceeding before the North Carolina Commission which had been initiated by the railroads, seeking to increase their intrastate civilian coach fares. (Pr. 247-257) Judge Hunter described the desultory nature of the evidence presented by the carriers in support of the intrastate application, and the important deficiencies in the railroads' proof which lead the North Carolina Commission to withhold action upon the railroads' application pending the filing of a petition, by the North Carolina Commission and others, with the fed-

eral Commission, seeking an investigation into the measure of the interstate coach fares under the greatly changed and financially profitable conditions of the carriers.

Heretofore in this Brief, under the title "The Case before the North Carolina Commission" are extracts from Judge Hunter's testimony in the North Carolina case before the federal Commission, I. C. C. No. 29036, and those extracts need not be repeated here. The substance is that the carriers before the North Carolina Commission had failed to justify the increase and failed to overcome the fact that the federal Commission had approved the 1.5 cent basic coach fare in the south during the times of economic depression and financial poverty of the railroads as being not unreasonable or otherwise unlawful; the fact that 10 per cent had been added to the fares to meet increased costs of operation in 1942, both interstate and intrastate; the fact that the federal Commission had found that all existing fares increased by 10 per cent would be just and reasonable for the future; the fact that the railroads, before the North Carolina Commission, had not even plead, but specifically disclaimed, any need of revenue; the fact that the evidence showed that the carriers were in a condition of great prosperity; the fact that no prejudice against interstate commerce had been alleged or shown; the fact that car-occupancy had vastly increased, thereby reducing unit costs per passenger mile, particularly in coaches; and the fact that there was an utter failure to prove the expense per coach mile—the pivotal fact—under the greatly changed conditions. (Pr. 247-257)

The North Carolina Commission wanted the facts. It did not get them from the railroads. It then *sought* the facts from the federal Commission, and filed a petition with the federal Commission (Exhibit No. 14 in I. C. C. No. 29036) (Pr. 384-387) so as to develop the necessary facts, not only as to intrastate coach fares, but as to interstate coach fares as well. (Pr. 252) In so doing the North Carolina Commission proceeded in that manner of comity and

cooperation which is expected of the federal and state Commissions by Congress in Section 13(3) of the Interstate Commerce Act, as follows:

> "The Commission (federal) may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this part (Part I, railroads) or part III (water carriers) with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission. . . . The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such state authorities in the enforcement of any provisions of this part (Part I) or part III."
> (See Appendix A to this brief.)

The federal Commission peremptorily refused to cooperate in the manner petitioned for by the North Carolina Commission, and others, contrary to the kind of cooperation which Congress expects of the Interstate Commerce Commission.

The North Carolina Commission has done what it should have done. The federal Commission has done those things which it ought not to have done and has left undone those things which it ought to have done.

Witness Nicholson, Director of Traffic of the North Carolina Commission, (Pr. 258) testified that the North Carolina Commission had authorized the discontinuance of certain passenger train services in North Carolina (Exhibit 15, tr. 184) (Pr. 393) on 684 miles of line on four railroads, principally the Southern Railway; that there is no passenger service on the Norfolk Southern's line from Raleigh, N. C. to Charlotte, N. C., a distance of 157 miles; (tr. 185); that the Winston-Salem Southbound, whose entire route is in North Carolina, has offered no passenger service for several years in North Carolina (tr. 185) (Pr. 258).

The elimination of passenger trains on non-paying lines helps to reduce expenses on remaining lines.

Mr. Nicholson's Exhibit No. 16 (Pr. 394), shows the average revenue per passenger mile, by class of service, received by class-I rail carriers in the Southern region during the period January 1941 to July 1943, inclusive. (tr. 187, 188)

The average of interstate and intrastate fares for 1942, including the 10 per cent increase in February and the increase from 1.65 to 2.2 cents interstate on October 1, 1942, was: 1.61 cents per mile in coaches other than commutation, 1.12 in commutation coach traffic and 2.58 cents in parlor and sleeping cars. (Exhibit 16, tr. 187) (Pr. 394)

Mr. Nicholson's Exhibit No. 17 (Pr. 395) shows the composition, both actual and relative, of revenue received from passenger and allied services by the class I rail carriers in the southern region during the thirty-one month period, January 1941 to July 1943, inclusive. (Tr. 187)

Page 2 of Exhibit 17 shows that coach traffic in the southern region is of great importance, compared with commutation, or pullman fares, as a producer of revenue; and that the great increases in passenger revenues, which have so reduced the passenger operating ratios, have been derived from coach traffic. For example, in January 1941 revenue from coaches was 37 per cent of the total; commutation 1.8 per cent of the total; pullmans 37.2 per cent of the total and other passenger revenues 24 per cent. In July 1943 the revenue from coach traffic rose to 60.8 per cent, commutation 2.4 per cent, the revenue from pullmans had declined to 27.5 per cent of the totals and other passenger revenue had dropped to 9.3 per cent (Exhibit 17, page 2.) (Pr. 396).

Page 3 of Exhibit 17 (Pr. 397) shows that the coach revenues in July 1943 were 487.2 per cent of the 1941 monthly average. This tremendous increase in coach travel, as indicated by the revenues, raises a strong presumption that the unit expense per passenger-mile in coaches, 1942 and 1943, has been greatly reduced.

The significant point developed by Mr. Nicholson's Exhibit 17 (Pr. 395-397) is the fact that commutation fares

still amount to an infinitessimal portion of the passenger-travel business in the south, unlike the Eastern District. Exhibit 17 provides an explanation for the logic in the federal Commission's approval in the *1936 Fares Case* of a 1.5 cent coach fare in the Southern region and a 2 cent coach fare other than commutation in the Eastern District.

The number of commutation passengers is negligible in the south, and over half the total in the East, and the commutation fares in the East were lower than the coach fares in the South. In the *1936 Fares Case,* 214 at page 177 the Commission said:

> "Of the total coach revenues for 1933, commutation fares represented 35 per cent in the East, 2 per cent in the South".

And the Commission said that in the U. S. as a whole in 1933 commutation passengers represented 62.8 per cent of the total passengers carried (page 177).

At page 219 the Commission said:

> "the greater portion of the passenger travel on the eastern railroads is now at fares below the basic fares."

The reason is that the commutation fares were much lower than the basic fares. At page 266, Appendix I Table 2 shows that the revenue per passenger-mile from commutation (suburban) coaches in the eastern district was only 1.34 cents, and 2.05 cents in other coaches, as compared with the average coach revenue in the southern district of 1.67 cents, per mile. The lower commutation fares in the eastern district were accounted for by the greater commutation-car occupancy of 29.2 in the eastern district as compared with 12.2 in other coaches. Even at the lower fares the revenue per car-mile in suburban coaches in the eastern district was 39.04 cents, as compared with the lesser revenue of 25.04 cents per car-mile in other coaches, and 23.83 cents per pullman car-mile. In other words, in the east, the commutation travel, with the *lowest* fare of 1.34 cents per pas-

senger-mile produced the *highest revenue* per coach mile, because its car-occupancy was so much greater than that of other coaches or pullmans.

Mr. Nicholson's Exhibit 17 (Pr. 395-397) brings this picture down to date in the south through the first half of 1943 and shows that coach fares other than commutation provided much higher percentages of the total revenue from passenger traffic than any other type of passenger traffic, and that the revenue from commutation traffic in the south was still as negligible in 1941, 1942 and the first half of 1943, as it was in 1933, as reported in the *1936 Fares Case*. In other words, the difference between the relative volume of coach to commutation travel in the south, and coach to commutation travel in the east, which formed the basis of the distinction between the basic coach fares which were approved and prescribed in the *1936 Fares Case*, still existed in 1941, 1942 and 1943, and the differences had been further accentuated in the south by the fact that the coach fares other than commutation in the south in July 1943 provided 60.8 per cent of the entire passenger revenues of the class I roads in the Southern Region.

And this is further fortified by the fact that the coach occupancy in the south on the six North Carolina roads, 44.96 in January-July 1943 (Tassin Ex. 9, p. 31) (Pr. 341) was much greater than the commutation-coach occupancy of 29.2 in the eastern district in 1933 when the commutation fares in the east averaged 1.34 cents. (*1936 Fares Case*, 214 I. C. C. at page 266).

The comparison would justify a reduction, not an increase, in the then existing fare of 1.65 cents per passenger mile in coaches in the south.

Civilian coach fares should not be burdened with the extra-heavy expenses entailed in the movement of troop trains.

Mr. Nicholson, referring to the testimony before the North Carolina Commission and the testimony of Witnesses Blackwell and Makinson in I. C. C. No. 29036, with

respect to the unusually heavy expense of handling troop trains and the large one-way-empty mileage of such trains and the concentration of equipment for such movements, and the giving of preference to troop trains over the movement of all other trains, testified that the extra expense incurred in troop movements should be borne by that type of service which creates it, and such extra expense should not be added to some other service (tr. 190-191) (Pr. 261). (Mr. Makinson's testimony, tr. 150) (Pr. 237-242) (Mr. Blackwell's testimony, tr. 19, 20, 30-31, 33, 35, 40-41, 156, 157, 158) (Pr. 153, 160) Mr. Nicholson's testimony is supported in principle by the decision of this court in *Northern P. R. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585, 35 S. Ct. 429 at page 433, that the outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned.

And yet the federal Commission, disagreeing with that principle said, in the North Carolina Case, (*Alabama Intrastate Fares*), 258 I. C. C. at page 148 that

> "To concede the correctness of this contention might be to impair the effectiveness of the provisions of Section 15a relative to the adequate and efficient railway service and to defeat the national transportation policy as declared in 54 Stat. L. 899, relative to developing, coordinating and preserving a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and the national defense . . ."

The Commission failed to explain why the fares for civilian travel in coaches should be burdened with the heavy expenses of troop-train movements, compensation for which is paid to the carriers by the federal government under contract. Civilian coach travelers cannot and do not ride on troop trains.

The objections of the Price Administrator and North Carolina to the evidence relating to the expense of troop train movements, on the ground that the compensation for

troop movements is not in issue should have been sustained. (tr. 15, 30, 31, 36) (Pr. 150, 159, 160, 163)

Certainly there is nothing in Section 15a or the general transportation policy set forth in 54 Stat. L. 899 which conflicts in any way with the doctrine cited from *Northern P. R. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585.

Mr. Nicholson also testified for the Charlotte Shippers and Manufacturers Association, and the point of their protest against any increase in fares for travel in non-reserved seat coaches is that the service in non-reserved seat coaches for intrastate travel is poor and is deteriorating, and that the non-reserved seat coaches are overcrowded and filthy. (tr. 191, 193) (Pr. 261, 262)

Witness B. F. Russell, a resident of Raleigh, and chairman of the Transportation Committee of Post E of the North Carolina Division of the Travellers' Protective Association, testified that the North Carolina Division of that Association has over 3600 members; that the object of the Association is to secure benefits for the members and improvements in service; that the Association does not feel that the war emergency should be used as an excuse for raising fares considering the poor service that is being given. We do not feel that we should be made to pay or rather to be punished for the inferior service that the railroads are furnishing. (tr. 198) (Pr. 266)

Mr. Russell's company has six salesmen traveling within the state of North Carolina who travel principally by train. Cars are already crowded beyond seating capacity. In a coach going from Greensboro to Greenville the screens were out and it was a very unsatisfactory ride. Coming back by Asheville, he was in a coach that was crowded to standing room. The heat was terrific in the coach. If the windows were open the cinders and dust were bad. (tr. 198-199). (Pr. 266, 267)

Most of his trips are within the State. The proposed increase in fares would cost his company more money for

the traveling of his company's men. He has never been able to use a streamlined coach for his journeys in North Carolina. (tr. 209) (Pr. 267)

Mr. Russell was formerly a locomotive engineer for the Southern Railway and has a kindly feeling for the railroads. The expense of travel is a serious item with the traveling man. We do not feel or believe that fares should be increased—certainly at this time. His objection to the increase is based primarily upon the poor quality of service for intrastate travel. (tr. 201) (Pr. 268)

Witness J. C. Bowman, inspector for the North Carolina Utilities Commission made some actual field investigations and inspections of coach-fare travel in North Carolina and prepared reports from his original records. His Exhibit No. 18 covers what happened at different places. (tr. 205) (Pr. 271, 398-400)

Intrastate travelers are denied the use of deluxe coaches on fast trains.

Page 1 of Exhibit 18 (Pr. 398) shows that on December 8, 1943, at the Seaboard Air Line Railway passenger station in Raleigh, N. C., he attempted to purchase a ticket to Hamlet, N. C. for use on either of their streamlined trains, the agent refused to sell him a ticket to Hamlet or to any other point in the State of North Carolina for use on these trains stating that Columbia, S. C., is the nearest point in the direction of Hamlet, N. C., to which a ticket could be purchased for use on the streamlined trains.

No attempt was made by the railroads to refute that testimony. It proves conclusively that intrastate travelers in North Carolina are not permitted to ride on the deluxe trains which are available to interstate travelers.

Travelers are not allowed to defeat the interstate fares.

Page 2 of Exhibit 18 (Pr. 398) is Captain Bowman's report of his investigation at the joint station of the A. C. L. and the Southern Railway at Selma, N. C., on December

8, 1943. The ticket agent stated to Captain Bowman that a ticket from Selma to Harriman, Tenn., based on a combination of fares over Hot Springs, N. C., and Newport, Tenn., could not be purchased for any amount less than $11.74 (the through interstate charge) which includes the Federal tax of 10 per cent.

Page 3 of Exhibit 18 (Pr. 398) shows that upon inquiry of the Agent of the Seaboard Railway at the station in Henderson, N. C., on Decemer 9, 1943, Captain Bowman learned that the streamlined trains do not stop at Henderson but that other trains are scheduled Southbound at 4:15 A. M., 9:90 A. M. and 8:05 P. M. Captain Bowman was quoted a coach fare of $5.97 including Federal tax to Columbia, S. C. He then asked whether it would be cheaper to buy a ticket to Hamlet and rebuy another from there to Columbia, whereupon the Agent stated that if anything the combination basis would exceed the single (interstate) factor fare.

This testimony negatives any assumption that there exists any practice of attempting to defeat the single factor interstate fares by purchasing two tickets.

Slow schedules and disagreeable accommodations in antiquated coaches.

Page 4 of Exhibit No. 18 (Pr. 399) is Captain Bowman's Report on December 21, 1943, of an inspection trip made from Washington, N. C., to Aurora, N. C. He had to spend a night in Washington, to await the schedule of the train, which was to leave early on the afternoon of the next day. The train did not come in until 3 p. m. The train crew shifted cars on the yard until 4 p. m. Captain Bowman was permitted to get on the train. But at 4:30 the porter told him that the train crew had gone to lunch. At about 5 p. m. the train crew came back and shifted cars again until 6:40 p. m. and finally pulled out five hours and forty minutes late, arriving at Aurora at 8 p. m. The coach was made of wood, and had no heat except a stove which was

located in the freight and baggage department, and as a result it was uncomfortably cold. The seats were so filthy with dirt and dust that he had to take a large map out of his brief case and spread it out on the seat to keep from ruining his clothes. From the time he arrived in Washington, N. C., until his trip was completed in Aurora twenty two hours had elapsed. Captain Bowman's report states that it is difficult to imagine a more unsatisfactory condition in the way of transportation for the traveling public and there is little wonder few people wish to use the train. (Pr. 399)

This evidence proves that the service afforded intrastate travelers in non-reserved-seat, slow-scheduled trains in North Carolina is vastly different from the greatly superior service afforded to interstate travelers in reserved-seat deluxe coaches on fast streamlined trains which run *through* North Carolina. The federal Commission in *Eastern Passenger Fares in Coaches*, 227 I. C. C. at page 31, said that passengers receiving such superior service in the special streamlined trains should pay a higher fare than is charged for inferior standard coach service. But the federal Commission ignored the evidence in the North Carolina Case which shows that the intrastate traveler is practically excluded from the streamlined trains with reserved seat coaches and that the service afforded is vastly inferior to the streamlined-reserved-seat interstate coach service.

Non-reserved seat coaches are badly overcrowded.

Captain Bowman further testified that the coaches are so much overcrowded; that it is hard to get a seat; and that he finds people standing in the aisles who are unable to get a seat. (tr. 206) (Pr. 272)

On a trip from New Bern, N. C., to Marion, N. C., he got off at Greensboro and was told by a porter inside that the train going to Marion would be an hour late, something like 2;40, before it would come in. He actually waited a

little more than two hours. When they called the train he tried to get back on the train. It was very much crowded and people were jammed in. He got kind of at the rear end of the crowd and the coach was filled to capacity and the steps and everything. Five or six of them were left out and finally some trainmen noticed them and took them to another coach and crowded them in, two or three coaches ahead, and they rode that way. The aisle was jammed, people sitting even between seats where they had the backs (of the seats) together. They had crawled under there and were sitting on the floor. There must have been a double capacity load there, because there were as many people standing as were seated, and that condition was pretty well the same all the way on up to Salisbury (N. C.) where Captain Bowman changed cars again. He found the trains more or less crowded all the way, especially from Raleigh to Marion. He had to change cars three times in getting from New Bern to Marion,—a distance of about 250 miles. The trip required fifteen hours and a half. They had long delays stopping here and there, at local stations. (tr. 207-208). The conductor made the remark that this is my last time trying to get through the coaches. I don't care if I don't get all the tickets, I can't make it. (tr. 209) (Pr. 273)

There is a vast difference in the quality and value of the services between travel in reserved and travel in non-reserved seat coaches.

The point of this testimony is that there is a vast and wide difference between the value and the quality of service accorded travelers in reserved-seat and travelers in non-reserved-seat coaches. When the seats are reserved, no such overcrowding to double the seating capacity can occur. (tr. 210) (Pr. 274) And yet the federal Commission failed and refused to recognize this important distinction in the quality and hence the value of the two distinct types of passenger service.

Antiquated coaches are used for non-reserved-seat travelers.

Witness C. B. Wade, inspector of the North Carolina Utilities Commission, testified, from original records and notes made on inspection trips of coach travel and conditions in North Carolina, that the type of equipment provided for coach travel in North Carolina is inferior and antiquated. (tr. 212, 213) (Pr. 276) He described a trip from Fayetteville to Wilmington, N. C. on the Atlantic Coast Line, from his report of December 21, 1943, Exhibit No. 19. (Pr. 276, 400) The coaches were heated by coal stoves and lighted by kerosene lamps. It was extremely hot and stuffy on account of poor ventilation. Passengers complained of the bad air and fumes in the car. It was impossible to get the coach warm at the time of starting. The only oil lamp burning in the coach was smoking badly and was about to explode when Mr. Wade called a trainman's attention to the bad odor and fumes from the lamp and he extinguished it with a cloth. It was then necessary to open the door and some of the windows in the coach for ventilation. The glass in the door and windows was dirty. The toilets were without light. The passenger compartment of the express car was equipped with slat benches on each side of one end, this being used for overflow passengers from the regular coach. Both coaches were made of wood. Approximately 106 passengers were handled on the two trips. I think I can safely assume that 75 to 80 per cent of the passengers were local. On the return trip from Wilmington persons were compelled to stand. On the trip going from Fayetteville to Wilmington the express car was also used to take care of the overflow. The distance between Fayetteville and Wilmington is 85 miles. The running time was approximately 3 hours and 45 minutes in each direction. (Pr. 400, 401)

Mr. Wade's testimony presents an average and typical non-reserved seat journey in North Carolina, which is in slow trains, with antiquated wooden coaches, which are

filthy, ill-lighted, and overcrowded. This type and quality of service stands out in sharp contrast to the travel *through* the state of North Carolina on fast, modern, stream-lined trains, in comfortable, not overcrowded, reserved-seat air conditioned coaches. (tr. 214) (Pr. 278)

The extremely high rates of return and extremely profitable operating ratios of the North Carolina roads.

Witness Doris S. Whitnack (Pr. 279), economist of the staff of the Office of Price Administration, presented statistics showing the tremendous increase in net railway operating income of the North Carolina railroads, their extremely high rates of return on investment before federal income taxes, and their extremely profitable operating ratios, both passenger and freight. Her Exhibit No. 20, (Pr. 279) parallels to some extent the statistics presented by witness Tassin for the railroads, and shows conclusively that the railroads were not in need of any additional revenue from their overall operations, or from passenger operations or from intrastate coach fares.

Exhibit 20 page 1 (Pr. 402) shows that the net railway operating income before federal income taxes for the seven Class-1 roads operating in North Carolina increased from $91,478,000 in 1936 to $282,783,000 in 1942, an increase of more than 200 per cent; and $362,211,000 for the 12 months ending October 30, 1943, an increase of 130.3 per cent over the year 1941. (tr. 219) (Pr. 280)

Page 2 of Exhibit 20 shows the freight and passenger revenues of the seven railroads for the years 1936 to 1943 (12 months ending with October 1943) the freight revenues for 1943 were 109 per cent of the 1936 revenues; but the passenger revenues for 1943 were 547.4 per cent of the 1936 revenues. (Pr. 403) In other words, the vast improvement in financial condition of the North Carolina Roads was due to the fact that the freight revenues in 1943 were more than double what they were in 1936—the year of the *1936 Fares Case;* and more important the fact that

the passenger revenues in 1943 were more than *six times* what they were in 1936. In 1942 the passenger revenues were about four times what they were in 1936. These figures included the two weak lines—the Clinchfield and the Norfolk Southern, which were permitted by the North Carolina Utilities Commission to increase their intrastate fares. (Pr. 403)

Page 3 of Exhibit 20 (Pr. 404) shows that the seven roads incurred net operating deficits in passenger service for the years 1936 through 1941; but that in 1942 each of the seven roads, excepting the two weak lines—the Clinchfield and the Norfolk Southern,—earned substantial new railway operating incomes from passenger service.

The extremely profitable passenger operating ratios.

Page 4 of Exhibit 20 shows the freight and passenger service operating ratios of the seven North Carolina roads for the years 1936 to 1942 and for 1943 estimated from the January-September reports. (Pr. 405) The average passenger operating ratios, even including the two weak lines, dropped from 123.6 in 1936 to 63.9 in 1942 and 52.3 in 1943. The average freight operating ratio dropped from 60 in 1936 to 54.7 in 1942 and 54.7 in 1943. The significant fact developed from this page of the exhibit is that the average passenger operating ratio in 1943—52.3—was more favorable for these seven railroads than their freight operating ratio of 54.7. (tr. 220-221) (Pr. 281, 405)

The Atlantic Coast Line passenger ratio in 1943—51.2, nearly equalled its freight ratio, 50.8. The L. & N.'s passenger ratio, 52.5, was better than its freight ratio of 57.1. The Seaboard's passenger ratio, 51.5 was better than its freight ratio of 57. The Southern's passenger ratio, 47.1, was extremely low, and profitable and much better than its freight ratio of 54.6. (Pr. 405)

The point of this evidence is that these four North Carolina roads, whose coach fares are at issue in this proceeding, were making exorbitant profits on their total opera-

tions and were making relatively more profits on their passenger traffic, than on their freight traffic. Under such circumstances it is difficult to understand why the federal Commission in its second, third, fourth and fifth reports in Ex Parte 148 has continued the emergency increase of 10 per cent on the passenger traffic of these southern roads while it has prevented all the railroads from restoring the horiontal increases under Ex Parte 148 on freight traffic.

Page 5 of Exhibit 20 shows the method used in assigning 1943 revenues and expenses to passenger service. (tr. 220) (Pr. 406)

The excessive rates of return on investment.

Page 6 of Exhibit 20 (Pr. 408A) shows that all seven of the North Carolina roads, even the two weak lines, were earning excessive rates of return, before federal income taxes, on various investment bases for the 12 months ended October 31, 1943. (tr. 222) (Pr. 282)

Three methods of computing the rates of return are set forth on page 6. The basis used in column 10 is the net railway operating income before federal income taxes for the twelve months ended October 31, 1943, divided by the sum of investments in railway property used in transportation service shown in column 2 plus cash and materials and supplies as shown in column 5. (tr. 222) This method makes no deduction for depreciation since original investment. (Pr. 282, 408A)

The column 11 basis of computing return showed an average of 18 per cent.

The basis used in computing the rates of return in column 11 is net railway operating income before federal income taxes for twelve months to October 31, 1943, minus rents for leased road and equipment, divided by the net book investment, after deducting the accrued depreciation and accrued amortization of defense projects in column 4, plus

cash and materials and supplies as shown in column 6. (tr 222) (Pr. 282, 408A)

The basis used in computing the rates of return in column 12 is net railway operating income before federal income taxes divided by net book investment plus cash and materials and supplies. Since column 11 and column 12 methods take into consideration the accrued depreciation, and there is only a slight difference between the results in columns 11 and 12, we shall describe the results in column 11 only. (Pr. 282, 408A)

The rate of return before federal income taxes, 1943, (column 11) for the seven North Carolina roads, including the two weak lines, was 18 per cent. The A. C. L.'s rate of return was 22.1 per cent; the L. & N.'s rate of return was 20 per cent; the S. A. L.'s rate of return was 17.6 per cent and the Southern's rate of return was 17.7 per cent. (Pr. 408A)

It is difficult to understand why the federal Commission should find that these North Carolina roads needed increases in revenues "to enable respondents to render adequate and efficient transportation service", (258 I. C. C. page 155) when the Price Administrator showed that they were earning 18 per cent return on investment before federal income taxes, and that their average passenger operating ratio was more profitable than their average freight operating ratio.

Even the weak lines were earning in excess of the standard rate of return.

Page 6 of Exhibit 20 (Pr. 408A) shows that the Clinchfield's rate of return was 45.5 per cent, and the Norfolk-Southern's rate of return was 7.9 per cent—both in excess of the standard rate of return of 5.75 per cent. But Mrs. Whitnack testified that passenger service is unprofitable for those two particular railroads. (tr. 225) (Pr. 284)

It was for that reason that the North Carolina Commission permitted the Clinchfield and the Norfolk-Southern to increase their coach fares, in a supplemental order, after

this showing had been made by the Price Administrator, and even though both weak lines in 1943 were earning, from their overall operations, more than the standard rate of return. Mrs. Whitnack testified that on the overall operations, the seven carriers listed on Exhibit 20 (Pr. 402) *do not need additional revenues.* (Pr. 285)

Page 8 of Exhibit 20 shows the comparative rates of return on various bases for class-I Line-haul railways in the Southern Region for 1937. (Pr. 409)

The carriers' rebuttal evidence.

The short testimony in rebuttal, which was presented by the railroads' witnesses Barry, (tr. 229), (Pr. 286), Hanes (tr. 234), (Pr. 290), Tassin (tr. 236), (Pr. 291), produced no important facts which require comment.

What evidence was covered by the stipulation made at the oral argument?

Doubt and uncertainty exists as to what evidence was made a part of the record by a stipulation, entered into at the oral argument before the Commission, upon the suggestion of the Commission itself.

At pages 21 to 24 (Pr. 410, 411) of the oral argument before the federal Commission in the four consolidated state coach fares cases, is reported a colloquy between members of the Commission and Mr. Bruce, representing the State of Alabama. Mr. Bruce had said that these respondent "southern carriers are showing the largest increases in passenger fares of any of the carriers which serve the State of Alabama." Commissioner Aitchison questioned Mr. Bruce "with respect to the gain that was going on." This was in answer to Mr. Gwathmey's statement, in his argument for the railroads that "I have no doubt that this Commission will feel justified as you did in Ex Parte 148, and taking notice of the current earnings reports of the railroads from which you will see that for a number of months

past there has been a very marked decline." (Argument before I. C. C. page 9) Commissioner Splawn said to Mr. Bruce (Pr. 411): "Do you object—and other counsel and the other carriers object—to the stipulation that we (the Commission) might use in these proceedings the monthly reports of the Bureau of Statistics?" Mr. Bruce answered: "No, sir. As a matter of fact, Mr. Commissioner, I would be very glad to stipulate that as far as I am concerned, as far as our case is concerned, that the Commission should use the Commission's records in regard to earnings." Each party agreed to the stipulation. (Oral argument before the I. C. C. pages 21-24.) (Pr. 411)

Now just what did that stipulation cover? No limitation was placed upon the consideration of "the Commission's records in regard to earnings". No limitation was expressed as to any particular reports covering any particular carriers for any particular period of time.

The Commission itself, in its report in *Alabama Intrastate Fares*, 258 I. C. C. 133, made liberal use of the various statistical reports which are based upon reports of the carriers to the Commission and published by the Commission's Bureau of Statistics. On page 140, (Pr. 78) the Commission said:

> "So, also for the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument, the increase in the passenger coach revenues of these carriers over the corresponding period of 1942 was 128.5 percent, as compared with an increase of 30.2 percent in the parlor and sleeping-car revenues.
>
> The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943."

On page 149 (Pr. 89) the Commission said that:

> "Turning to the system figures for the seven principal respondents, following is a comparison of 1942 and

1943, from the record as supplemented by stipulation of counsel at the argument."

and the Commission then recited from the annual reports of the carriers for 1942 and 1943 the revenues, expenses, operating ratios and net railway operating incomes. The Commission then went on to state the "relation of net railway income to investment in railway property including cash, materials, and supplies, for these respondents," and their average rates of return, after Federal income taxes, for the years 1938 to 1942, inclusive.

It is apparent that the Commission understood that the stipulation at the oral argument included the annual reports of the respondent carriers, and the monthly reports of statistics relating to freight and passenger traffic.

And yet, when the affected States sought to show, in their petitions for reconsiderations, from such annual, monthly and statistical reports issued by the Commission that the federal Commission had erred in its statement on page 140 of the report that "the net railway operating income has steadily declined" the federal Commission either refused to consider such statistics from such published reports of the Commission as had been made a part of the evidence by the stipulation at the oral argument, or else, if it considered such statistics, failed and refused to correct its statement that "net railway operating income has steadily declined." (Pr. 79) We sought to show from such reports that in 1943 and the early months of 1944 the gross revenues had greatly advanced, that the passenger revenues had increased much faster than the freight revenues and that the passenger revenues from coach travel were increasing much faster than those from other types of passenger service.

All of these things the federal Commission failed or refused to consider, or if it considered them, it failed to correct its erroneous findings.

North Carolina's petition for further hearing etc., to receive supplemental statistical evidence, etc.

In North Carolina's petition for further hearing, etc., dated April 26, 1944, (Pr. 449) we pointed out (Pr. 452) that "it is now not clear just what statistics were to be covered by that stipulation" at the oral argument; that some of the statistics in the exhibits were for the first six months of 1943, others for the first nine months, others for the first 10 months of 1943 and others for the 12 months ended with October 31, 1944, and that the federal Commission's report contains some statistics for these part-year periods and some for the complete year 1943, whereas other statistics for the complete year 1943 were omitted from the federal Commission's Report. (Petition page 5) (Pr. 452) We pointed out that the federal Commission's report fails to state what were the passenger operating ratios for the North Carolina lines for 1943 but found that the passenger operating ratio of the 12 Alabama respondents in 1943 was lower than for 1942, without showing how much the improvement was or what the ratio was. (Pr. 452)

North Carolina pointed out that the federal Commission's use of the statistics for the month of December 1943 (under the stipulation) lent itself to unfair and incorrect inferences and deductions for the reason that December 1943 was an *atypical* month. (Petition page 6) (Pr. 453) North Carolina petitioned for opportunity to present statistics for the complete year 1943 and the early months of 1944 to prove that the federal Commission's use of the atypical month of December 1943 was unfair. (Pr. 453)

North Carolina sought to show, from these statistics that the operating ratio of the North Carolina respondents showed a further improvement for the complete year 1943, over the complete year 1942; that the carriers net railway operating income in January 1944 was more than Three Million Dollars greater than the figure shown in the Commission's report for December 1943; and that their rail-

roads' expenses in January 1944 were considerably less than in December 1943. (Petition page 8) (Pr. 454)

In view of the uncertainty as to what evidence was to be covered by the stipulation at the oral argument before the Commission, and of the erroneous use by the federal Commission of December, 1943 as pointing the way to a steady decline in railroad revenues, whereas that month was an atypical month, the federal Commission's action in denying the petition to introduce the complete statistics for the year 1943 which should have been considered as within the stipulation, and the early months of 1944 to show that revenues and earnings were increasing in 1944, instead of declining, was arbitrary and unreasonable.

Other grounds upon which reconsideration was sought by North Carolina.

North Carolina's petition for further hearing, etc., presented numerous other grounds for further hearing, reconsideration and reargument, all of which were denied, peremptorily by the federal Commission without any further Report. Since the major points upon which that Petition was based were raised again in the Court below, only a short description of those grounds need be included here.

The primary grounds of the petition were that:

No person complained of the intrastate fares, (Pr. 455) and hence there was no evidence to support the finding of advantage to "persons in intrastate commerce" and prejudice "against persons in interstate commerce," as found by the Commission in its numbered finding 6. (Pr. 96) (Petition page 10, Pr. 455, 456)

The coach fare, of 1.5 cents in the south had been found to be not unreasonable or otherwise unlawful in the *1936 Fares Case*, had been stoutly championed by the Southern Railway, and therefore the burden of proof to justify any increase in that fare, after the 10 per cent increase under Ex Parte 148, rested heavily upon the railroads. (Petition pages 10 to 15 inclusive.) (Pr. 456-462)

The Commission may not lawfully require increases in fares under existing conditions of excessively high earnings as a means of offsetting deficits from passenger operations in past years under different conditions. (Petition pages 20, 21.) (Pr. 463, 464)

The failure of the federal Commission to set forth in its Report the rates of return on investment during the two war years, 1942 and 1943, unduly and unfairly minimizes the effect of the existing and greatly changed conditions. (Petition pages 22-24) (Pr. 465, 466.)

The consideration of rates of return *after* federal income taxes is improper, as found by the Commission in *Reduced Rates, 1922*, 68 I. C. C. 676, 683, and *Increased Rates 1942*, 248 I. C. C. 545, 556. (Pr. 467, 468)

Respondent North Carolina lines' average rate of return was excessive even "after" federal income taxes, (Petition 27-28) (Pr. 469) and respondents are earning excessively high rates of return on investment. (Petition page 32) (Pr. 469, 472)

The increased expenses of passenger operations generally during war-years have been far more than off-set by increases in passenger revenues, hence this is not a "revenue-need" case, (Petition pages 32-33) (Pr. 472, 473)

The federal Commission must consider and base its conclusions upon existing conditions of over-profitable war-years and not upon unprofitable pre-war years, (Petition 37-38) and upon the reasonable expectancy that the period of excessively high railroad earnings will continue for some years. (Petition page 38) (Pr. 477)

The railroads failed to prove the most important single fact of all—the relation of their expenses per passenger mile to their revenues per passenger mile in coaches. (Petition page 38-39) (Pr. 478)

The failure of the railroads to prove that most important fact is evidence of the strongest character against them. (Petition page 40) (Pr. 478, 479)

Sample computations from the statistics, introduced by the railroads, show that the intrastate coach fare of 1.65 cents greatly exceeded the expense per passenger-mile in coaches; and that the expense is less than 1 cent per mile. (Petition 41-44) (Pr. 479)

The only evidence as to the reasonableness per se of the coach fares was a bare comparison with the interstate fare, which is not sufficient. The statistics presented by the railroads point to the fact that the coach fare of 1.65 cents was unreasonably high. (Petition page 43-46) (Pr. 483)

There is no evidence to support the finding No. 4 of preference and advantage to persons or localities. (Pr. 484)

There is no evidence to support the findings No. 5 & 6, of unjust discrimination against interstate commerce, (Petition page 47-48) or any revenue-need under Section 15a(2); or that the intrastate coach traffic "does not bear its fair share of the cost of the service" or "its fair share of the *cost* of maintaining an adequate railway system". *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 586. (Petition 48-51) (Pr. 485, 486) On the contrary, the statistics presented by the railroads and the Price Administrator prove conclusively that the North Carolina respondents are earning excessive rates of return; and that their passenger traffic contributes relatively more of the excess profits than their freight traffic.

North Carolina was denied the opportunity to present its Exceptions to a Proposed Report of the Examiner, or to file a Reply Brief.

North Carolina's Petition for further hearing, etc., of April 27, 1944, (Pr. 449) contained matter which, ordinarily, would be incorporated in Exceptions to the Proposed Report of the Examiner, under the federal Commissions Rules of Procedure. But, at the conclusion of the hearing in the North Carolina Case, the Examiner announced that no Proposed Report of the Examiner would be issued, although a Proposed Report had been issued in the Kentucky,

and Alabama Cases. Request was then made by North Carolina for opportunity to file a reply Brief in the North Carolina Case, and the Examiner refused to permit it, although Rule 93 of the Rules of Practice of the Commission so provide, when no proposed Report is to be issued. (Tr. 243) (Pr. 455)

The denial of the Petition for further hearing, etc. was arbitrary.

In view of the fact that no Proposed Report of the Examiner was issued in the North Carolina Case, in view of the fact that the Examiner denied North Carolina's request to file a Reply to the Railroads' Brief, in view of the many errors of fact and law set forth in North Carolina's Petition for further hearing, etc., after the Report of the federal Commission in the four consolidated State Coach Fare Cases, the federal Commission's refusal to hold a further hearing, refusal to hear re-argument, and refusal even to reconsider its Findings and Order, without any report or finding, or statement of reasons for the denial of the Petition, was arbitrary.

The Petition was denied May 8, 1944, although the federal Commission well knew, from the reports filed with and published by it, and from its supplemental Reports in Ex Parte 148, that the railroads revenues from freight and passenger traffic were steadily increasing and not "steadily declining" as stated in its report in *Alabama Intrastate Fares*, 258 I. C. C. at page 140. (Pr. 79) (See *Increased Railway Rates, Fares, and Charges*, 1942, 255 I. C. C. 357, and 256 I. C. C., 502, the latter decided November 8, 1943, and 259 I. C. C. 159 decided November 12, 1944.) In that Report the Commission said that the passenger revenue of all class I railroads was:

in 1940	$ 416,896,703
in 1941	514,632,532
in 1942	1,028,306,460
in 1943	1,653,000,000
in 1944	1,800,000,000 (estimated).

And the Commission further said that the passenger revenues of southern region railroads amounted to 46 million in 1939, and 283 million in 1943, "an increase of about 516 percent."

Thus in May 1944, when it denied North Carolina's petition for further hearing, etc., the federal Commission undoubtedly knew that the passenger revenues in the southern region had increased tremendously, and were not "steadily declining."

The denial of North Carolina's Petition, and the like petitions of Kentucky, Tennessee, Alabama and the Price Administrator under such conditions, was arbitrary.

The federal Commission did not hesitate long to reopen and reconsider several times, its findings and correct its mistakes, with respect to freight traffic, which it made in the original report in Ex Parte 148. Why was it so unwilling to reconsider its mistakes in the four States Coach Fares Cases?

Description of the types and extent of the evidence tendered to the District Court.

North Carolina's suit to enjoin and set aside the order of the federal Commission was heard before Circuit Judge John J. Parker, and District Judges I. M. Meekins and John J. Hayes, at Fayetteville, N. C., on July 12, 1944.

North Carolina introduced in evidence the entire record made before the Interstate Commerce Commission in I. C. C. 29036, including the Brief of the Price Administrator, North Carolina's Petition for Further Hearing, etc., and the railroads' answer thereto. (Tr. 8-9 before the District Court) (Pr. 114, 115)

North Carolina then tendered photostatic certified copies of monthly and annual reports of the carriers to the Interstate Commerce Commission. Counsel for the Interstate Commerce Commission objected to the receipt of the annual reports. (Pr. 115) He made no objection to the receipt of the monthly reports, conceding that they were included in

the Stipulation made at the oral argument before the Commission. He insisted that all that was covered by the Stipulation was "the monthly statistical reports which had been gotten out since the close of the hearing" before the federal Commission. (Tr. 10 before the District Court.) (Pr. 115) Reference back to the stipulation will show that no such limitation was made in the Stipulation as that contended by Counsel for the federal Commission.

The said monthly and annual reports of carriers to the Federal Commission were received in evidence, subject to further ruling. (Tr. 11 before the District Court) (Pr. 116)

A certified copy of the federal Commission's Rule 93 of its Rules of Practice was tendered and received in evidence. This is the rule which permits reply briefs when no proposed report of the examiner is to be issued. (Pr. 116)

A certified copy of the request made by the North Carolina Commission upon the railroads for certain data, in the cause before the North Carolina Commission, was admitted, subject to further ruling. (Tr. 11-12 before the District Court) (Pr. 116)

An affidavit of Mr. Frank A. Downing, of the North Carolina Commission, which was attached to North Carolina's petition to set aside the federal Commission's Order, and which is an analysis and interpretation of the facts appearing in the said monthly and annual reports of the carriers to the federal Commission, was received in evidence subject to further ruling. (Pr. 116, 117)

Like rulings were made with respect to a like amended affidavit of Mr. Downing, and an affidavit of Mr. H. M. Nicholson, which had been attached to the Petition for the purpose of showing irreparable damage to North Carolina Travelers, unless the Order was enjoined. (Tr. 14) (Pr. 117)

Tender was made of certain Executive Orders on behalf of the Price Administrator, and the District Court ruled that judicial notice would be taken of them and that there was no necessity for introducing them in evidence. Copies

were furnished to the Court for its convenience. (Pr. 117)

Certified copies of certain pages of the Reports of the Interstate Commerce Commission, referred to in the Price Administrator's intervening complaint, were received without objection. (Tr. 14-15). (Pr. 118)

Certified copies of Statement M-100 for the months of August to December 1943, and Statements No. 150 and 250 for the months of July to November 1943, of the federal Commission's Bureau of Statistics and Transport Economics were received without objection. (tr. 15) (Pr. 118)

Like copies of Statement M-100 for the month of June 1943, and for the months of January and February 1944, were tendered. Objection was made on the ground that they were issued "*after the decision of the Commission*". They were received subject to further ruling. The decision of the Commission is dated in March, 1944,—after, not before—the months of January and February 1944. Because of this, there is doubt and uncertainty as to whether the monthly reports of January and February 1944 are in evidence or not. Obviously the report for June 1943 was not subject to that objection, and it should be considered as in evidence, not subject to further ruling.

Counsel for the Price Administrator offered an affidavit, which is similar to the one attached to the intervener's complaint, correcting certain errors in the earlier affidavit, and revising the figures. Objection was made by counsel for the federal Commission, and the affidavit was received, subject to further ruling. (tr. 16-17) (Pr. 119)

Counsel for the federal Commission tendered, for the convenience of the Court, printed copies of the federal Commission's Reports in the *1936 Fares Case*, 214 I. C. C. 174, and in Ex Parte 148—248 I. C. C. 145, 255 I. C. C. 357, and 256 I. C. C. 502, and the supplemental report of May 12, 1944 which, at that time had not been printed. (Pr. 119-120)

He also tendered a copy of the Commission's Order of January 21, 1942 in Ex Parte 148, which order permitted

the horizontal increase of 10 per cent in all then existing passenger fares, without any report or findings of fact. (Pr. 120)

The railroads, in case the affidavits of North Carolina and the Price Administrator should be received, tendered affidavits of J. S. Tassin, and E. H. Oliver, subject to the same ruling. (Pr. 120)

The District Court's ruling upon the evidence.

As to such evidence which the District Court received subject to ruling, the District Court held that

> "We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered."

(56 F. Supp. 606, at page 621, (20)). (Pr. 572)

What statistical reports were included and what were excluded.

The holding of the District Court, that evidence not embraced in the record before the Commission is excluded, (Pr. 572) is susceptible to different interpretations as to what *was* embraced in the record before the Commission. Our interpretation of the rulings at the hearing before the District Court and the holding in the decision of the District Court is that the record before the Commission included the following:

(a) the entire record made before the Interstate Commerce Commission including, the brief of the Price Administrator, North Carolina's petition for further hearing and the railroads' answer thereto;

(b) Certified copies of pages of the reports of the Interstate Commerce Commission referred to in the Price Administrator's intervening complaint which were received without objection;

(c) Certified copies of I. C. C. Statement M-100 for the months of August to December, 1943, inclusive, and statements No. 150 and 250 for the months of July to November, 1943, inclusive, of the I. C. C. Bureau of Statistics and Transportation Economics, which were received without objection.

(d) Copy of Statement M-100 for the month of June 1943 which should have been included within the ruling with respect to similar statements for later months of 1943.

(e) Statement M-100 for the months of January and February 1944, the contents of which were used in the petition to the federal Commission for further hearing, etc., and which months were before the date the decision of the federal Commission March 25, 1944.

(f) The photostatic certified copies of the monthly and annual reports of the carriers to the Interstate Commerce Commission which were tendered by North Carolina and the Price Administrator to the District Court and which under our interpretation of the stipulation at the oral argument before the federal Commission were made a part of the record before the Commission. These are the reports which were received by the District Court subject to further ruling at page 11 of the transcript before the District Court.

Our interpretation of the evidence which was excluded by the District Court consisted of:

(a) An affidavit of Mr. H. M. Nicholson to show irreparable damage if the federal Commission's order is not enjoined. The facts in that affidavit were not in the record before the Commission and could not have been there. There was no prior time or opportunity at which such evidence could have been presented. No objection was made to the fact that this evidence was tendered by affidavit.

The witness was present and subject to cross-examination;

(b) The affidavit of Mr. Frank A. Downing, containing an analysis and interpretation of the facts and figures appearing in the monthly and annual reports which were made a part of the record before the Commsision by stipulation. The affiant was present and could have been cross-examined;

(c) Like affidavits presented by the Price Administrator, analyzing and interpreting the facts in the said monthly and annual reports issued by the federal Commission. The affiant was present and subject to cross-examination;

(d) The monthly reports issued by the federal Commission for months later than February 1944;

(e) Affidavits of J. S. Tassin and F. H. Oliver, for the intervening railroads; and

(f) Copy of request made by North Carolina upon the railroads for certain data in the companion case before the North Carolina Commission.

What is in the tendered affidavits.

An explanation must be made of the contents of the tendered affidavits and their nature and purpose in order that the Supreme Court may determine whether or not the District Court erred in excluding them.

It will be recalled that the statistical exhibits of record before the federal Commission were derived from the Annual Reports of Carriers for years prior to 1943, and the cumulative monthly experience of the calendar months through varying periods of 1943. Some pages of the exhibits covered the first 6 months of 1943, others 9 months of 1943, and others 10 months of 1943. Under the Stipulation, made at the oral argument before the federal Commission, the federal Commission also used the month of December 1943. The testimony of the statisticians for North Carolina, the Price Administrator, and the railroads, used in certain instances the current monthly reports of varying cumulative monthly periods of 1943, and

they estimated the results for the complete year 1943 based upon the several cumulative monthly reports which were available when the respective exhibits were prepared.

Exhibit 9 (Pr. 315) p. 4, uses September 30, 1943, and 10 months ended September 30, 1943. (Pr. 317)

p. 26 and 30 use January-July 1943, in comparison with prior complete years. (Pr. 336, 340-342)

Exhibit 10, (Pr. 341), p. 2 and 3 use the year December 1, 1942 to November 30, 1943. (Pr. 342, 344)

Exhibit 11, (Pr. 345), p. 2 and 19 use December, 1942 to October, 1943, inclusive, (Pr. 346)

Exhibit 12 (Pr. 364) p. 2 to 19 inc. use December, 1942 to October, 1943, inc. (Pr. 365-387)

Exhibit 16, (Pr. 394) p. 1 uses January to July, 1943, inc.

Exhibit 17, (Pr. 395) p. 1 uses January to July 1943, inc.

Exhibit 20, (Pr. 401) p. 1 and 2 use 12 months ending October 30, 1943. (Pr. 402-403)

p. 4 uses January-September, 1943, as a means of estimating the year 1943 in comparison with prior years. (Pr. 405)

p. 6 uses 12 months ended October 31, 1943. (Pr. 408A)

North Carolina's Petition for further hearing (Pr. 449) uses January 1944, and the complete figures for 1943 to show that the federal Commission erred in using December 1943 as marking the downward trend in railroad revenues and earnings.

North Carolina's Petition to the District Court (Pr. 1) and the affidavit of Mr. Downing (Pr. 28) use January, February and March, 1944, for the same purpose, to prove that December 1943 was an abnormal month and should not have been used by the federal Commission as definitely marking a downward trend in railroad traffic, revenues, or earnings.

The Price Administrator's Petition to the District Court (Pr. 38) and the affidavit of Mrs. Whitnack (Pr. 54) use the complete year 1943, based upon various annual and monthly reports of carriers to the federal Commission.

The federal Commission in its report (258 I. C. C.) at page 138 uses the "first nine months of 1943" and the 12 months ended October 31, 1943 (Pr. 76)

at page 139 it states the passenger operating ratios for the *year* 1943; (Pr. 77)

at page 140 it uses "the first seven months of 1943"; (Pr. 78)

at page 140 it refers to "the first 10 months of 1943, the latest available statistics of this kind, which were stipulated of record by the parties at the oral argument." (Pr. 78)

on the same page of the Report the federal Commission makes the statement, inconsistent with the one just quoted, that "The latest of such reports now on file with and available to us are for the month of December 1943. (Pr. 78)

on page 149 the Commission uses the Statistics from the annual reports for 1943 of revenues, expenses, operating ratios and net railway operating incomes. (Pr. 89)

Having used total 1943 actual figures in its Report, upon what reasoning did that Commission rely to support its objection before the District Court, to the use of the annual reports for 1943 by North Carolina and the Price Administrator? If the Commission used the annual reports for the year 1943, under the stipulation made at the oral argument before the federal Commission, why are North Carolina and the Price Administrator to be denied the use of them?

It is well to explain to the Supreme Court that Statement M-100 (Pr. 118) is a statement of operating revenues and expenses of class I steam railways in the United States, excluding switching and terminal companies, and is issued monthly by the federal Commission. It shows many sepa-

rate primary accounts such as Revenues, divided between Freight, Passenger, Mail and Express; Expenses, divided between Maintenance, Depreciation, etc., Traffic, Transportation and General; total railway operating revenues; total operating expenses; taxes, divided between federal income and other taxes; railway operating income; equipment and joint facility rents; net railway operating income; and ratio of expenses to revenues (operating ratio); all month by month, and region by region, comparing the month of the current year to the same month of the preceding year, on one side of the large sheet. On the other side are like cumulative statistics for the aggregate of the 12 months of the current year with the aggregate of the same months of the preceding year. Thus the December Report of 1943 shows such statistics for the month of December 1943, compared with December 1942, and, on the reverse side, shows like aggregate statistics for the 12 months of the year 1943 compared with the 12 months of the preceding year. The statistics in the December report thus cover the cumulative statistic for the entire year.

Statements M-150 and M-250 (Pr. 118) are made up in like fashion; and the reports for the month of December 1943 show, on the reverse side, the combined passenger traffic statistics for the aggregate 12 months of 1943.

Now, since the federal Commission used the December 1943 monthly reports M-100 and M-250, showing revenues, earnings, ratios and passenger traffic statistics for the various regions from *one* side of the December 1943 monthly reports, why did that Commission object so strenuously to the use of the aggregate 12 months of 1943 which appear upon the reverse side of that report?

Having used the total annual statistics of 1943 in its Report, upon what ground did the federal Commission appropriately object to the use and consideration of the annual reports for 1943 by North Carolina, the Price Administrator, the District Court and the Supreme Court?

The reason for the use of the reports for the early months of 1944.

North Carolina did not contend that the decision should be based upon any one month, or the early months of 1944. It did present to the federal Commission, in its petition for further hearing, the statistics for the early months of 1944 for the purpose of showing the unfairness of the use of December, 1943, an abnormal month. North Carolina's position was and is that the consideration of any one month, particularly the abnormal month of December, 1943, was an unsafe guide; that the Commission should have founded its decision upon the two complete years of 1942 and 1943; and that the federal Commission should take judicial notice of the fact that the war is likely to last a number of years; and that the effects of the war upon rail traffic and revenues will continue to be felt for some years to come.

North Carolina had no opportunity to except to a Proposed Report. Its petition for further hearing was its first opportunity to take exception to the federal Commission's arbitrary use of the abnormal month of December, 1943. The only way to prove that December 1943 was abnormal and not a safe guide in estimating the trend of railroad revenues was to show, from the available reports for the early months of 1944, (prior to the decision of March 25, 1944) that December was abnormal, and that railroad revenues were continually rising in 1944 over 1943, as they had in 1943 over 1942.

Why did the federal Commission before the District Court object to the use of the monthly reports of January and February 1944, when the reports for that month were before the federal Commission in North Carolina's petition for further hearing? Why was it unwilling to admit its mistake in basing the North Carolina decision upon its erroneous deductions based upon the use of the abnormal month of December 1943?

The federal Commission was using current annual and monthly reports in a collateral proceeding under a similar stipulation.

The Commission's order in the North Carolina case was not entered until May 8, 1944. (Pr. 507) Just at that time the same Commission was considering the statistical reports and earnings of the carriers in Ex Parte 148, in which it rendered another report, 258 I. C. C. 455 decided May 12, 1944 prohibiting the railroads from continuing the Ex Parte 148 increase on freight traffic. (See the Commission's Brief dated July 3, 1944, before the District Court in the North Carolina Case.) Thus the federal Commission knew and must have known, when it denied North Carolina's petition for further hearing in May 1944 that December 1943 was an abnormal month, that railroad traffic was increasing and that railroad revenues had continued to increase in 1944 over 1943, as they had continued to increase in 1943 over 1942.

In its Second Supplemental Report in Ex Parte 148, 258 I. C. C. 455, at page 456, the Commission said:

"From the periodical reports filed with us by petitioners, (the railroads), which the parties *stipulated at the original* hearing might be referred to, and considered by us, we have *continued to observe* the trends of traffic and the financial results of respondents' operations. Consideration thereof led us to make and serve an (Supplemental) order April 17, 1944 . . ."

Since the federal Commission made such free and liberal use of the monthly and annual reports of the carriers to the Commission in Ex Parte 148, when the carriers were the petitioners, why was that same Commission so insistent that the annual reports for 1943, and the monthly reports for the early months of 1944 should be excluded from the evidence before the District Court?

The above-quoted extract from the Report in Ex Parte 148 refers to a stipulation which was similar to the stipu-

lation made at the oral argument in the North Carolina case. The purpose of both stipulations was to enable the Commission to "observe the trends of traffic and the financial results of respondents' operations," which were to be gained from viewing the annual and current monthly, and cumulative monthly reports of the carriers to the Commission, as published by the Commission. That is what Commissioner Splawn, and counsel for North Carolina, Kentucky, Tennessee and Alabama, had in mind when the Stipulation was made at the oral argument in the four consolidated State Coach Fares Cases.

The contrasting position of the federal Commission in these two contemporaneous proceedings, indicates an attitude of paternalistic solicitude for the railroads in Ex Parte 148 and an attitude of hostile opposition to the four State Commissions in the State Coach Fare Cases.

The purpose of the affidavits was to substitute actual figures for estimates.

The purpose of the statistics presented in the affidavits of Mr. Downing, (Pr. 28) for North Carolina and Mrs. Whitnack for the Price Administrator, (Pr. 54) was to replace the estimated figures for 1943 with the actual reported figures for 1943 from the annual and monthly reports, all of which were available to the Commission and to the public prior to the decision of the federal Commission on March 25, 1944.

Why should the federal Commission object to the substitution of actual figures for estimated figures? The vigorous objection of the federal Commission to consideration of the actual figures in lieu of estimated figures was arbitrary.

As a matter of fact there is very little difference between the revised figures presented in the affidavits of Mr. Downing and Mrs. Whitnack and the estimated figures, which North Carolina and the Price Administrator used in their exhibits, briefs and petitions for further hearing.

The District Court, in such circumstances erred in excluding any of the tendered affidavits.

The differences between the estimated figures of record, and the revised and corrected figures in the tendered affidavits are small.

Let us compare the revised figures in the tendered affidavits with the figures used in the exhibits of record, the briefs, and the petitions for further hearing.

Operating ratios.

Mr. Downing's affidavit (Pr. 28) shows that, based upon the complete reports for the year 1943, instead of the constructive year 1943, (using reports for the months of 1943 which were available at the time) the passenger operating ratio of these four North Carolina lines averaged 62.55 for the year 1942 and 51.84 for the year 1943. These corrected figures differ very slightly from the passenger operating ratios of 63.9 in 1942 and 52.3 for 1943, (estimated) for the seven North Carolina roads shown on page 4 of Exhibit No. 20 (Pr. 402).

Mr. Downing's affidavit (Pr. 28) also shows the revised actual combined freight and passenger operating ratio of these four North Carolina railroads for 1943; and shows that their combined ratio for freight and passenger was higher than their ratio for passenger traffic. In other words the passenger traffic was yielding relatively more profit in relation to expenses than the freight traffic (Pr. 30). The total combined freight and passenger operating ratios shown in the Whitnack affidavit (Pr. 54) (Table H attached to the Complaint (Petition) of the Price Administrator) (Pr. 56A), for the four North Carolina roads, taken from the annual reports, are the same as those shown in the Downing affidavit. That table in the Whitnack affidavit also shows that the average combined total operating ratio of all class I roads in North Carolina for the year 1943,

56.08%, was less profitable than their average passenger operating ratio of 52 06% (Pr. 56A).

This refutes the finding of the federal Commission that the average freight operating ratio was lower and more profitable in 1943 than the passenger ratio. That was not true of the southern region, or of the average of the four North Carolina roads. The federal Commission failed and refused to correct its mistake.

Return on investment.

Mr. Downing's affidavit (Pr. 30) shows that the average rate of return of the four North Carolina railroads before federal income taxes was 14.23% in 1942 and 18.07% in 1943. These differ slightly from those shown on page 6 of Exhibit 20, as follows:

Ex. 20 p. 6 (Pr. 408A) Col. 11.

	1943	Downing's Affidavit 1943 (Pr. 30)	
A. C. L.	22.1%	20.15%	
L. & N.	20	18.85	
S. A. L.	17.6	16.42	
Sou. Ry.	17.7	17.15	
Avg. of 8 roads	18	18.07	Avg. of 4 roads

Downing's Amended Affidavit (Pr. 520) corrects this average of 18.07% to 18.09%.

It will be noted that in each instance the Downing affidavit using the complete annual reports for 1943, shows a slight reduction in the rate of return of each of these four roads, as compared with the rates of return shown in the Whitnack Exhibit 20, page 6, under a slightly different method of computation. But the revised average of the 4 roads differs very slightly from the average of the 8 roads shown in Exhibit 20, page 6, column 11.

The affidavit of Mrs. Whitnack, using the annual reports for 1943 shows revised rates of return before federal income taxes of these four roads, as follows: (Pr. 56A)

A. C. L.	20.13%
L. & N.	19.76%
S. A. L.	16.23%
Sou. Ry.	16.66%

Thus, Mrs. Whitnack's rates of return vary very slightly from those tendered by Mr. Downing for these respective carriers, and in each instance her revised rates of return are lower than those shown in her Exhibit No. 20, page 6, column 11 (Pr. 408A). (See Table I attached to the complaint (Petition) of the Price Administrator to the District Court.) (Pr. 54)

Expense per coach passenger mile.

Mr. Downing's affidavit (Pr. 29) shows that the expenses per passenger mile in coaches of 0.98 cent for 1942 and 0.81 cent for 1943, which appear in North Carolina's brief dated February 16, 1944, (p. 51) and petition for further hearing (p. 41), (Pr. 479), included 6 North Carolan railroads, whereas, excluding the Clinchfield and the Norfolk Southern, which had been permitted by the North Carolina Commission to increase their intrastate fares, the comparable expenses per passenger mile in coaches for the four North Carolina roads, A. C. L., L. & N., Seaboard and Southern were 0.97 for 1942 and 0.91 for 1943. (Pr. 28)

It will be noted that the substitution of the actual figures for the estimated figures changed 1942 only 1/100 of 1 cent and changed the figures for 1943 only one tenth of 1 cent per passenger mile.

Mr. Downing's amended affidavit (Pr. 519) shows

0.77 cent for 1942
and 0.63 cent for 1943.

North Carolina's position in this proceeding is no different whether we use the estimated expense per passenger mile in coaches shown in the brief and petitions for further hearing or the revised figures shown in Mr. Downing's affi-

davit (Pr. 28, 519) which were tendered to the District Court.

Mrs. Whitnack's affidavit, Table III page 2 and 3 attached to the Amended Complaint of the Price Administrator to the District Court, shows the expenses per coach passenger-mile for 1942 and 1943 as follows: (Pr. 56B)

	1942 p.2	1943 p.3
A. C. L.	0.68 cents per mile	0.61 cents per mile
L. & N.	0.95	0.60
S. A. L.	0.73	0.61
Sou. Ry.	0.75	0.69
Total of 6 Class I roads	0.77	0.63

It will be noted that whether the simple computations in the Brief and Petition for further hearing in the North Carolina Case, or the Downing affidavit, or the Whitnack affidavit is used, the expense per passenger mile in coaches was less than 1 cent in 1942 and 1943, as compared with the prescribed fare of 2.2 cents.

There is a definite reason in this proceeding why the Commission should have granted the petition for further hearing, particularly with respect to the expense per coach passenger mile, and why the District Court should have received the supplemental evidence in the affidavits with respect to the expense per passenger mile.

At the commencement of the hearing before the Interstate Commerce Commission, in defining the issues, the statement was made for North Carolina that since the Interstate Commerce Commission had denied North Carolina's petition to investigate the interstate fares on trains going through North Carolina the reasonableness of the interstate coach fares is not in issue in this proceeding (tr. 14). The Examiner said: (Pr. 150)

> "Well it is before the Commission to the extent that it is a burden resting upon respondents (railroads) to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understand-

> ing. Otherwise it is *not in issue.* It is *not subject to attack* and the parties are at liberty to shown what facts they have and their position on that particular question." (tr. 15)

The Examiner's ruling that the burden rested upon the railroads to establish the reasonableness of the then proposed fares was in accordance with the provisions of Section 15 (7) of the Interstate Commerce Act, hereinbefore referred to;

> "The burden shall be upon the carriers to show that the proposed changed rate, fare . . . is just and reasonable." (See Appendix A to this Brief.)

The carriers made no attempt to show the cost of the coach service in relation to the proposed increase in coach fares from 1.65 cents to 2.2. cents, knowing full well that the burden of proof rested upon them. In fact no evidence whatsoever was presented by the railroads bearing upon the cost or expense of the coach service in relation to the proposed increase in fare from 1.65 to 2.2 cents.

There was no burden upon North Carolina to prove anything with respect to the reasonableness of the interstate fares. The Examiner ruled that that was *"not subject to attack."*

In North Carolina's brief and in oral argument before the Commission the point was stressed that the burden of proof was upon the carriers and that that burden had not been sustained by any showing of the relation of the cost or expense of coach service to the then-existing or then-proposed coach fares. In North Carolina's brief, pages 49-53 inclusive, simple computations from the carriers exhibits of record produced estimated expenses per coach passenger mile of 0.98 cents for 1942 and 0.81 cents for 1943. In its report the federal Commission failed and refused to find that the burden of proof was on the carriers and failed and refused to find that the carriers offered no evidence to show the relation of cost or expense of coach

service to the then existing or then proposed fares under the changed conditions of 1942 and 1943.

The Commission failed and refused to find as requested by North Carolina that the railroads' failure to show the expense per passenger mile in coaches under existing conditions raises a strong presumption of law that if such a showing had been made it would have been disadvantageous to them; and that failure to produce evidence upon this most important single point of proof was due to the fact that the showing would have been against their interest in this proceeding; and that their silence under such circumstances became evidence of the strongest character against them, having failed to produce vitally important facts within their peculiar possession and knowledge. (North Carolina's brief, pages 44 to 46 inclusive and cases cited therein.) *Interstate Circuit* v. *United States*, 306 U. S. 208 at page 225 and 59 S. Ct. 467.

In the Commission's report nothing with respect to this important point, raised and pressed by North Carolina, can be found. The omission of any statement of the contention or any ruling upon it and the failure to take into consideration the expense per coach passenger-mile therein computed by North Carolina from the exhibits of record was arbitrary.

In North Carolina's petition for further hearing, etc. this point was again raised and pressed in like manner (Pr. 478, 479). The Commission denied that petition without any report or finding, leaving the assumption that the Commission overruled our contention that the burden of proof was on the carriers, overruled our contention that the failure of the railroads to produce the expense per coach passenger mile was evidence of the strongest character against them, and refused to take into consideration the vast reduction in expense per coach passenger mile which was caused by the heavy increase in the number of passengers per non-reserved seat coach who traveled in 1942 and 1943.

These same points, that the burden of proof was on the carriers, that they failed to present evidence showing the expense per coach passenger mile, and that their failure to do so was evidence of the strongest character against them, was again presented and pressed before the District Court (Pr. 15). The District Court ignored or tacitly overruled North Carolina upon these points and erred as a matter of law in not ruling as requested by North Carolina.

In the brief, in the petition for further hearing and in the affidavits presented to the District Court, the showing by simple mathematics is made, from the carriers' own exhibits, and the stipulated reports that the expense per coach passenger mile in 1942 and 1943 of the principal North Carolina railroads was less than 1 cent per passenger mile and less than one-half of the proposed fare of 2.2 cents per passenger mile.

Since the federal Commission and the District Court failed to make the requested finding when the burden of proof was upon the carriers, there was no way in which North Carolina could show the unfairness and the arbitrariness of the ruling without presenting and having considered the estimated expenses per coach passenger mile which were set forth in the brief, the petition for further hearing and in the affidavits of Mr. Downing and Mrs. Whitnack which were attached to the petitions to the District Court and which were tendered to the District Court. The showing in the petitions and those affidavits of the tremendous reduction in expenses per coach passenger mile directly supports the point, made by North Carolina, that the failure of the railroads to produce such evidence, which was within their possession, was evidence of the strongest character against them.

Unless North Carolina is permitted to show the approximate expense per coach passenger mile in this way it will be denied the opportunity to establish and develop this point which has been made and preserved throughout these proceedings. The Commission, in the *1936 Fares Case* reported

extensively upon the expense per passenger mile in various types of equipment. Why was that point of proof so important in the *1936 Fares Case* and of such little importance in the North Carolina case that the Commission failed and refused even to mention it in its report?

The District Court erred in excluding the tendered evidence, which was supplemental and corrective, showing the approximate expense per coach passenger mile on the lines of the principal North Carolina respondents.

The point is important for the reason that the facts shown are conclusive against the carriers. By no system of accounting and by no methods of logic could the Interstate Comerce Commission justify an order requiring the railroads to increase the intrastate coach fares of 1.65 cents to 2.2 cents when the expense thereof was less than 1 cent per coach passenger mile.

Why is this most important and vital point of proof as to the reasonableness of the proposed fare of 2.2 cents repeatedly to be shielded from view?

A SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

I. The Federal Commission committed a number of arbitrary acts which, in their entirety, constitute the denial of a full hearing as required by statute.

(See Assignments of Error Nos. I, XIII, XI, XV, XXXV and Points Relied Upon No. 1).

II. Evidence was wrongfully excluded by the District Court.

(See Assignments of Error No. I and Points Relied Upon No. II).

III. a. The railroads failed to sustain the statutory burden of proof to justify their proposed increase, or to show that the intrastate fare was unreasonably low or non-compensatory, or that 2.2 cents per mile represented the lowest cost as provided in Section 15 (a) (2).

b. The evidence conclusively negatives the need of any increased revenue from coach traffic, or revenues from all traffic, and hence the intrastate coach fares did not burden or discriminate against interstate commerce.

(See Assignments of Error Nos. VII, XIV, XV, XX, XXX, XXXII, XXXIII, XXXV, XXXVI and Points Relied Upon Nos. III, IV, V, VI, XI, XII).

IV. Rates of return should be computed before federal income and excess profits taxes.

(See Assignments of Error Nos. VII, XIV, XV, XVIII, XXXII and Points Relied Upon Nos. VIII, IX, XI.)

V. Coach fares cannot lawfully be increased to compensate for deficits from aggregate passenger operations in former years.

(See Assignments of Error Nos. XIX, XXIX and Points Relied Upon No. VII.)

VI. Extra expenses and costs that pertain exclusively to the operation of streamlined trains and the movement of troops were erroneously considered as justification for increase in fares for travel in ordinary coaches.

(See Assignments of Error Nos. V, IX, XXVII, XXVIII and Points Relied Upon Nos. X, XVI.)

VII. The finding of prejudice as between persons is without any evidence to support it.

(See Assignments of Error Nos. VIII, XXI, XXII, XXIII, XXXI, XXXVIII, XXXIX and Points Relied Upon Nos. XIII, XIV, XV.)

VIII. The federal Commission has no power to order an increase in intrastate coach fares simply to bring about "uniformity" with the interstate coach fares.

(See Assignment of Error No. XXV, and Points Relied Upon No. XVIII.)

IX. The evidence does not justify the exercise of federal power over these intrastate coach fares.

(See Assignments of Error Nos. II, III, XXIV, XXVI, XXVII, XXVIII, XXXII, XXXVI, and Points Relied Upon Nos. XVII, XIX, XX.)

ARGUMENT.

Condensed Summary of the Argument.

I. "Full" hearing was denied.

The District Court erred in holding that

> "the Commission reached its conclusion after full hearing and thorough consideration of all questions presented." (56 F. Supp. 606, at pages 617 and 618.)

The federal Commission committed a number of arbitrary acts which, collectively, constitute the denial of a full hearing.

II. Evidence was wrongfully excluded by the District Court.

(a) The District Court erred in excluding evidence tendered to it, including the reports of carriers and the affidavits which supported the Petitions to set aside the federal Commission's Order, and which affidavits consisted primarily of explanations and simple computations of statistics taken from Reports of the federal Commission—(which reports had been stipulated into the record at the oral argument before the Commission)—and which affidavits consisted principally of corrections of like computations which had been made from exhibits of record before the Commission and which prior computations had been previously pressed to the attention of the federal Commission in the briefs, oral argument and petition for further hearing.

The District Courts, in such cases are courts of original jurisdiction, and not appellate tribunals.

(b) Unless the State Commissions are accorded full opportunity to put in evidence before the District Courts their alleged facts to prove that the federal Commission based

its conclusions upon erroneous statements of vital facts, and based its conclusions upon unfounded assumptions of fact; and that the federal Commission failed and refused to hear and consider vital facts which conclusively show that the federal Commission's ultimate conclusions were unfounded and directly contrary to fact, the State Commissions will be denied their day in court to test the accuracy of the findings, or the sufficiency of the evidence before the Commission or the arbitrariness of its act in denying the petitions for further hearing and reconsideration, or whether the facts warrant its usurpation of the power of the States to regulate intrastate commerce.

III. The railroads failed to justify the increase.

(a) The District Court erred in failing to find:

That the railroads had presented to the federal Commission no substantial evidence to sustain the statutory burden of proof upon them to show that their then existing intrastate coach fares under the vastly changed conditions, since the Report in the *1936 Fares Case*, were unreasonably low or non-compensatory;

That the railroads had presented no evidence with respect to the cost of coach service which would sustain the statutory burden upon them to justify the proposed increase in southern coach fares from 1.65 cents to 2.2 cents;

That the railroads had produced no evidence to sustain the burden upon them to prove that such coach transportation, at the proposed increased fare of 2.2 cents, would be provided at the *lowest cost* as provided in Section 15 a(2).

The evidence conclusively negatives the need of any increased revenue from coach traffic, or revenues from all traffic.

(b) The District Court and the federal Commission erred in failing to consider and find that the evidence before and tendered to the federal Commission and the District Court proved the following ultimate facts:

That the four remaining respondent North Carolina railroads' expense per coach passenger mile was 0.77 of one cent for the year 1942 and 0.63 of one cent for the year 1943, (Pr. 519) or less than half of the proposed fare of 2.2 cents, and that the proposed fare of 2.2 cents is grossly extortionate and unreasonably high in relation to the cost, and unreasonably high in relation to the then existing fare of 1.65 cents, and hence the coach traffic in 1942 and 1943 was bearing more than its share of the costs of their total passenger services;

That their average passenger operating ratio in 1943 was lower than their freight operating ratio, and hence their total passenger traffic was bearing more than its share of the costs of their total transportation services; (Pr. 56A, 405, 445) and

That their net railway operating incomes were yielding an average rate of return of 14.16 per cent in 1942 and 18.09 per cent in 1943, (Pr. 518, 520) which are grossly excessive; and their net income from railway operations, *after* federal income and excess profits taxes exceeded the standard rate of fair return;

And hence, that the intrastate coach fares did not burden interstate commerce, or unjustly discriminate against interstate commerce and the North Carolina railroads did not need additional revenue from coach passenger traffic or from their total traffic. These facts show conclusively that there was no warrant for the exercise of federal power over these intrastate coach fares.

IV. Rates of return should be computed before federal income and excess profits taxes.

The District Court and the federal Commission erred in failing and refusing to find that the railroads' rates of return on investment of value of carrier property should be computed by use of the net railway operating income *before*, and not *after* deducting federal income and excess profits taxes; and that the four North Carolina roads' average rates of return so computed were 14.16 per cent in

1942 and 18.09 per cent in 1943 (Pr. 520) and were grossly in excess of the standard rate of fair return of 5.75 per cent; and the District Court erred in failing and refusing to find that this showing by North Carolina and the Price Administrator was conclusive upon this point and warranted a reversal of the finding of the federal Commission that these railroads needed additional revenue to enable them to render adequate and efficient transportation service (See finding No. 5, 258 I. C. C. at pages 154, 155 Pr. 95).

V. Fares cannot lawfully be increased to compensate for passenger deficits in former years.

The District Court erred in failing and refusing to find that the federal Commission's Order unlawfully required increases in coach fares during the years of swollen war-profits, to compensate for deficits from total passenger operations in former lean years.

VI. Troop trains and streamlined trains.

Civilian passengers cannot lawfully be required to pay increased fares for intrastate travel in non-reserved overcrowded seat coaches in slow ordinary trains for the purpose of defraying the extra expenses incurred in the movement of troop-trains, and de luxe streamlined trains which are not available to intrastate travelers.

VII. No evidence of prejudice against persons.

(a) The District Court and the federal Commission erred in finding that the mere difference in fares caused undue and unreasonable advantage and preference of intrastate passengers and undue and unreasonable disadvantage and prejudice of interstate passengers; and

(b) The District Court erred in failing and refusing to find that proof of a mere difference in fares is not sufficient; that no interstate traveler alleged or testified that he was prejudiced by the difference in fares; and that, in the total absence of any definite and certain proof of injury

to persons, the federal Commission's finding of undue prejudice and disadvantage to persons cannot be sustained.

VIII. Uniformity.

The federal Commission has no power to order an increase in intrastate coach fares simply to bring about "uniformity" with the interstate fares.

IX. The evidence does not justify the exercise of federal power over these intrastate fares.

The District Court erred in sustaining, and in itself applying, erroneous rules of law and principles which were applied by the federal Commission; and in failing and refusing to find that the federal Commission's ultimate findings are not supported by substantial evidence; and in failing and refusing to find that there is no evidence which justified the exercise of the federal authority over the intrastate coach fares; and in failing and refusing to set aside the federal Commission's Order; and in denying the relief prayed for.

The type of case presented here.

There are aspects of the case presented here which are novel, and which differ from any previous case which has been found in the Supreme Court's Reports.

This is a "Section 13 Case" in which the regulatory power of the State of North Carolina over common-carrier railroads engaged in intrastate commerce in North Carolina has been overthrown and automatically set aside by the Order of the Interstate Commerce Commission which order compels certain railroads to increase their intrastate civilian coach fares in North Carolina.

This case reaches the Supreme Court through the accustomed procedural steps. The case began before the North Carolina Commission, on the application of the North Carolina railroads, and was renewed before the Interstate Commerce Commission, which held a hearing, heard oral argu-

ment, made its findings, denied petitions for further hearing, and entered its Order. A special district court of 3 judges refused to set aside the Order of the federal Commission. North Carolina and the Price Administrator appealed to this Court to reverse the District Court.

Our first Point — that a full hearing was denied — is founded upon a collection of varied incidents, each of which, if viewed separately, may be so hedged about by technicalities as to escape the condemnation of the Supreme Court, but all of which, when viewed collectively, and "in their entirety" amount to an "abuse of administrative discretion" and a "clear showing that the limits of due process have been overstepped". Arguments, that full hearings have been denied, are frequently made and infrequently sustained in cases challenging Orders of the Interstate Commerce Commission, but in no reported case have we found such a succession of incidents as are presented in this case, the cumulative effect of which so clearly shows that the limits of due process have been overstepped. The plea that the Supreme Court view the real substance of the *cumulative effect of these incidents* "in their entirety" is novel.

Our Second Point—that the District Court erred in excluding the evidence tendered to it including the affidavits accompanying the Petitions to set aside the Order of the federal Commission—raises a question of law in a way which, as far as we can find, has not been presented to this Court. There have been cases attacking Orders of the federal Commission in which the question has been raised as to whether a trial de novo may be had. In some types, such as Orders for the payment of money and suits to enforce rate Orders of the federal Commission, trial de novo is the accepted practice (Note 1 below). In others, additional

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Note 1.

Orders for the payment of money and orders to enforce orders of the federal Commission:

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. 925, affirmed 162 U. S. 184.

Missouri Pac. Ry. Co. v. *Ferguson Sawmill Co.*, 235 Fed. 474.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.*, 37 Fed. Rep. 567.

Interstate Com. Com'n v. *Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295.

evidence, by affidavits and otherwise has been tendered to and accepted by the Courts depending upon the circumstances (Note 2 below). In other cases the doctrine has been applied, although with no statutory compulsion, that cases before the District Courts, where an Order of the federal Commission is assailed, must be tried upon the record made before that Commission (Note 3 below).

The federal Commission, our adversary, invokes that doctrine in this case. The reason for its non-application here will be made clear. It is, briefly, that, the federal Commission used an abnormal month of December, 1943, as a guide in predicting the early downfall of the excessive earnings of the carriers; no opportunity was afforded to North Carolina to prove how wrong and unreasonable and arbitrary that was. The Commission failed and refused to reopen the case for that purpose and for the purpose of inquiring into the costs of the non-reserved seat coach serv-

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Note. 2

Cases in which additional evidence by affidavits or otherwise has been tendered and received.

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457, 38 S. Ct. 383.

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 73 Fed. Rep. 409.

Interstate Commerce Commission v. *Chicago, B. & Q R. Co.*, 94 Fed. Rep. 272.

Western New York & P. R. Co. v. *Penn Refining Co.*, 137 Fed. Rep. 343, 353, 70 C. C. A. 23.

Interstate Commerce Commission v. *East Tennessee & V. & G. Ry. Co.*, 85 Fed. Rep. 107.

Missouri, K. & T. Ry. Co. v. *Interstate Commerce Commission*, 164 Fed. 645.

State of Florida v. *United States*, 31 Fed. 2d 580.

Mississippi Valley B. Line Co. v. *United States*, 292 U. S. 282, 54 S. Ct. 692.

Railway Express Agency v. *United States*, 6 F. Supp. 249, 293 U. S. 532, 55 S. Ct. 212 (dismissed for want of jurisdiction.)

Arkansas Railroad Commission v. *Chicago R. I. & P. R. Co.*, 274 U. S. 597, 47 S. Ct. 724.

State of New York v. *United States*, (Lehigh Valley) 257 U. S. 591, 42 S. Ct. 239.

Shinkle, Wilson and Kreis Co. v. *Louisville & N. R. Co.*, 62 Fed. Rep. 690.

Note 3.

Cases which have been confined to the record before the Commission.

Louisiana and P. Ry. Co. v. *United States*, 209 Fed. 244

Interstate Commerce Commission v. *Lehigh Val. R. Co.*, 49 Fed. Rep. 177.

ice under existing and greatly changed conditions; and failed and refused to report, or examine, or consider the fact that the expense per coach passenger-mile under existing changed conditions was far below the then existing intrastate coach fare of 1.65 cents due to the vast increase in average coach-occupancy; and failed and refused to consider actual figures for 1943 in lieu of the various estimates for 1943 statistics which were employed in the exhibits of record when the figures for the entire 12 months period of 1943 were available by stipulation made at the oral argument.

Under these circumstances there was no way in which North Carolina and the Price Administrator could prove their allegation of arbitrariness without the production of the statistics which showed how unreasonable the Commission was not to hold a further hearing, correct its own mistakes, and reconsider its ultimate conclusions in the light of actual facts. The rejection by the Court of evidence to show these things, which the Commission prevented us from placing of record, would make the federal Commission the sole arbiter of what evidence it receives and considers. The holding of the District Court upon this point would mean that the federal Commission "had a power possessed by no other officer, administrative body or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat." (*Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 at page 186).

Our Third Point—that the federal Commission had found that the coach fares in the south were not unreasonable in the past and would be just and reasonable for the future—and that certain railroads had failed to justify the proposed increase in coach fares, and that the evidence conclusively proves that these railroads were not entitled to and did not need the proposed increase in coach fares—our Third Point—is founded upon facts and circumstances which are dis-

tinctly novel, and set this case apart from any previous Section 13 cases before this court.

Our Fourth Point—that rates of return should be computed before deducting federal income and excess profits taxes—is not new in principle—but is of grave national importance. This Court has decided this Point in principle, with respect to utilities other than railroads. The federal Commission has decided this Point (in our favor) in two major investigations before it, but failed and refused to follow its own decisions when asked to do so in these Coach Fares Cases, and the federal Commission even refused to set forth in its findings of fact what rates of return before federal income and excess profits taxes these North Carolina railroads were earning in 1942 and 1943, although such rates of return are set forth in the exhibits of record before the Commission.

The District Court, although requested so to do by the Price Administrator and North Carolina, refrained from stating such rates of return and failed and refrained from deciding the Point and even refrained from mentioning the fact that the Point had been pressed upon it by the Price Administrator and North Carolina.

It is in the public interest that this question be determined by the Supreme Court in this proceeding.

Our Fifth Point—that the federal Commission, without lawful authority, ordered an increase in intrastate coach fares to an extortionate level under existing conditions of war-born prosperity, as a means of recouping losses from passenger traffic in the former lean years of a bygone era of national economic depression—goes to the root of the fundamental concepts which permeate the entire Report of the Commission, and the Report of the District Court. The Report of the District Court expressly, and at length, holds that carriers may, under changed economic conditions, when the trend of earnings is towards war-born profits, recoup the losses incurred in the bygone era of economic

depression. This question is not new in principle and our point of law is founded upon principles applied and stated by the Supreme Court, but its application here is novel in that, in no previous reported case have we found an attack upon a federal Commission's order requiring increases in any federal Commission prescribed charges when the carriers were earning a rate of return of 18 per cent. That circumstance is so novel that it is glaringly conspicuous to those who, up to this time, have labored under the impression that the fundamental purpose of the Act to Regulate Commerce was to prevent the railroads from earning excessive rates of return. We venture the prediction that no Congress has ever expected its creature, the Interstate Commerce Commission to so forget its fundamental purpose as to prescribe and actually require, by its own order, increases in charges to an unreasonably high level for the purpose of increasing the profits of the railroads when they are earning a rate of return of 18 per cent.

Our Points Six, Seven and Eight are not new, and are founded upon findings of the federal Commission and decisions of the Supreme Court. Point Seven—that there must be definite and certain proof of injury to persons to support a finding of undue prejudice against persons—rests squarely upon specific holdings of the federal Commission sustaining the vigorous arguments on behalf of the railroads themselves.

The treatment of this case by the Commission and the District Court as a general-revenue case instead of a particular fare case has resulted in some strained and untenable reasoning in their Report and Opinion.

We ask particularly that the Supreme Court bear this distinction in mind throughout our argument in order that the Court may appreciate how far afield the Commission and the District Court have gone in the misuse of and misapplication of the principles applicable to general-revenue cases in reaching their conclusions in this particular fare case.

The distinction was clearly stated by the federal Commission itself in *Increases in Intrastate Freight Rates,* 186 I. C. C. 615 at page 620:

> "In the administration of the interstate commerce act a definite class of cases has come to be recognized where the paramount question is the general level of rates throughout the country or in territorial parts thereof, i.e., whether the aggregate revenues of the carriers shall be increased or reduced by a change in this general level. These are known as general revenue cases. For reasons which are apparent, it is impracticable in such proceedings to consider individual rates. It is necessary to deal with rates in the aggregate or by broad classes, and the rights of shippers and carriers with respect to individual rates are protected by a saving clause which makes the general findings without prejudice to subsequent findings in individual situations. The Supreme Court has recognized the practical necessity of dealing with the general rate level in this way. (New England Divisions Case, 261 U. S. 184, at pages 197-198)."

This is not a general nationwide revenue case, but a case relating to one particular type of service performed by passenger trains on particular railroads in a particular region.

The federal Commission, in its Report and the District Court, in its Opinion, have viewed the issues in this case and discussed the evidence in relation to the principles which are usually applied in the consideration of a nationwide general investigation into the collective profits of the railroad transportation system as a whole, and their collective need of revenue to support an adequate transportation system.

This is not that type of case. The issues in this case relate to one of the several kinds of service in passenger car, as distinguished from the various types of service which are rendered on passenger trains, such as pullman berth and parlor car reserved seat service, special deluxe

streamlined reserved-seat coach and extra fare train service, tourist car service, commutation coach service, express service, and the transportation of mail, milk and cream in passenger trains. It relates to non-reserved seat coach service on regular (not deluxe) trains over the lines of only a few railroads which operate within the State of North Carolina. It is in no sense and in no degree a nationwide general-revenue case. For convenience we shall refer to this distinction as between a "particular fare" case and "a general-revenue case." The distinction and the differing principles employed in each have been recognized by the Commission and the Courts.

ARGUMENT.

Supporting the Nine Main Points.

POINT I. A full hearing was denied.

The mere fact that the proceeding was assigned for hearing before an Examiner and the mere fact that some evidence was presented and received does not constitute a "full hearing" which is guaranteed to adversaries before the federal Commission. The mere formality of holding a "hearing" is not sufficient.

> "A full hearing is one in which *ample opportunity* is afforded to *all parties* to make, by evidence and argument, a showing *fairly adequate* to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

Akron, C. & Y. Ry. Co. v. *United States*, 261 U. S. 184, 200, 43 S. Ct. 270, 277. The *New England Divisions* Case.

> "The provision for a hearing implies both the privilege of introducing evidence and the *duty of deciding* in accordance with it. To *refuse to consider evidence* introduced or to make an essential finding without supporting evidence is arbitrary action."

Baltimore & O. R. Co. v. *United States,* 264 U. S. 258, 265, 44 S. Ct. 317, 319, 320. *The Chicago Junction Case.* (In which the New York Central sought to obtain control of terminal railroads at Chicago).

> "Whether the order deprives the carrier of a constitutional or a statutory right, whether the hearing was *adequate* and *fair,* or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power".
>
> "Administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was *inadequate* or manifestly unfair; if the finding was contrary to the indisputable character of the evidence . . . or if the facts found do not, as a matter of law support the order made."
>
> "Manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."

Interstate Commerce Com. v. *Louisville & N. R. Co.,* 227 U. S. 88, 33 S. Ct. 185, 187.

Thus a full hearing is one in which ample opportunity is afforded, by evidence and argument, to make a fairly *adequate* showing, and one which is manifestly *fair,* and one in which the parties know what evidence is offered and *what evidence is considered,* and one in which opportunity is given to *test, explain* and *refute* the evidence considered.

We shall show that North Carolina was not accorded a "full hearing" which meets these requisites.

The Commission committed seven arbitrary acts which, viewed "in their entirety" constitute an "abuse of administrative discretion" and a "clear showing that the limits of due process have been overstepped."

The seven arbitrary acts which show that a full hearing has been denied to North Carolina are set forth in the Statement of the Case and will be enumerated in abbreviated form:

1. The Commission's Hasty Order of August 1, 1942, (Pr. 524), increasing the interstate coach fares of the southern lines from 1.65 cents to 2.2 cents—an increase of 33.3 per cent, over and above the increase of 10 per cent under Ex Parte 148,—was made only two weeks after the carriers' application was filed, and was made arbitrarily, without any hearing, or evidence, or report.

2. The Petitions for Suspension and Investigation of the tariffs, publishing the increases in interstate fares which were approved by the Hasty Order, were denied arbitrarily by the federal Commission without any hearing, or evidence, or report.

3. The Petitions of the several southern states and the Price Administrator to investigate the reasonableness of the interstate coach fare of 2.2 cents, which resulted from the Hasty Order, in view of the greatly changed conditions, and the patent reduction in cost per coach passenger mile due to the drastic increase in non-reserved seat coach-occupancy were denied, arbitrarily, and, likewise, without any hearing, or evidence, or report.

The federal Commission, before the District Court attempted to shield its arbitrary action in denying those petitions upon the technical argument that they were "petitions" and not "complaints", although the statute provides that such complaints shall be brought to the Commission "by petition". Section 13 (1) Appendix A to this brief.

The federal Commission had no statutory authority to deny and dismiss those complaints or "petitions". Section 13 (2) provides that "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant". Appendix A to this Brief. The full hearing guaranteed by Section 15 (1) relates to such complaints "as provided in Section 13". Appendix A to this brief.

The Hasty Order, (Pr. 524) the Petitions for Suspension and the Petitions to Investigate the reasonableness of the coach fares increased under the Hasty Order are not the

subject of direct attack in this Section 13 proceeding, but the findings in the North Carolina, Kentucky, Tennessee and Alabama Cases with respect to the reasonableness of the coach fares in the south, are predicated almost wholly upon the increased fares which resulted from the Hasty Order, the denial of the Petitions for Suspension, and the denial of the Petitions to Investigate the reasonableness of the coach fares.

4. In view of the Examiner's ruling that the reasonableness of the interstate coach fares

> "is before the Commission to the extent that it is a burden resting upon respondents (railroads) to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise it is *not in issue* It is *not subject to attack.*"

(tr. 15); in view of the failure of the railroads to show the cost of the non-reserved-seat coach fare service under the greatly changed conditions, and their failure to sustain the burden of proof; in view of the fact, that therefore the reasonableness of the interstate fares was "not in issue", and "not subject to attack" according to the Examiner's ruling; in view of the fact that the Commission failed and refused to find that the statutory burden was upon the carriers, and that they had failed to sustain that burden, but had relied almost wholly upon the Hasty Order of August 1, 1942; the act of the Commission was arbitrary in making the finding that the interstate fare of 2.2 cents was just and reasonable and that 2.2 cents was the minimum reasonable fare for intrastate travel in non-reserved-seat coaches.

The finding was without any substantial evidence to support it and without the basic findings of fact either in its report in *Alabama Intrastate Fares* (Pr. 69) or in the Hasty Order, (Pr. 524) which are requisite to support such findings. There is an absence of "the basic or essential findings required to support the Commission's order." *State*

of Florida v. United States, 282 U. S. 194, 215, 51 S. Ct. 119, 125.

The Commission erred in relying upon the Hasty Order, which was made without hearing, evidence, findings or report, and which therefore could not form the foundation for "the basic or essential findings required to support the Commission's order."

5. The Examiner's action, in refusing to issue a Proposed Report, whereas the Proposed Report procedure had been allowed and followed in the Kentucky and Alabama coach fare cases, thus denying to North Carolina the opportunity to take exceptions to his findings prior to the final report of the Commission itself, was arbitrary. It is of no moment whether his action was upon his own initiative as agent for the Commission or upon specific instructions from the Commission itself. His act, at the time, was the arbitrary act of the Commission.

6. The Examiner's action in refusing North Carolina the opportunity to file a Reply Brief, which is permitted by Rule 93 of the Rules of the Commission in such cases where no Proposed Report is to be issued, was arbitrary (Pr. 116).

7. The federal Commission's action, in denying the Petitions for Further Hearing, etc., was arbitrary.

North Carolina's Petition showed that the Commission's Report contained misstatements of important facts, and contained deductions which were unfounded and arrived at by unfair processes; and that certain of the Commission's ultimate findings were without evidence or any substantial evidence to support them and contrary to indisputable evidence, and unsupported by the requisite basic findings; and that other findings were contrary to law; and that important findings of fact and law, which had been requested by North Carolina, which would have warranted a reversal of the ultimate findings, were omitted from the Commission's report.

The petition for further hearing also showed the arbitrary acts of the Commission and the Examiner, hereinbefore enumerated, which constituted the denial of a full hearing. No complete re-statement of the grounds of the Petition is deemed necessary here.

Between the date of the Report March 25, 1944 (Pr. 69) and the date of the order, May 8, 1944, (Pr. 509) in the North Carolina case, the federal Commission had before it the statistics of the early months of 1944 which showed that the statistics for the month of December, 1943, upon which the federal Commission leaned so heavily, were unreliable, and did not reflect the actual trend of passenger revenues. The denial of the petition for further hearing, under all of these circumstances, viewed in their entirety, was arbitrary.

The Commission's arbitrary act in summarily refusing to grant that petition and the like petition of the Price Administrator, resulted in the denial to the parties of the opportunity to which they were entitled, to "test, explain or refute" the plain errors of fact and erroneous deductions from unreliable guides, and errors of law which appeared for the first time in the Commission's Report. North Carolina and the Price Administrator had no previous opportunity to "test, explain or refute" the findings in the Report. *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 187.

The cumulative effect of these seven arbitrary acts of the Commission, viewed collectively, "in its entirety" constitutes "an abuse of administrative discretion," and a "clear showing that the limits of due process have been overstepped." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586, 62 S. Ct. 736, 743.

North Carolina and the Price Administrator have been denied the full hearing to which they are entitled under the Interstate Commerce Act, and the due process clause of the Fifth Amendment to the Constitution.

The hearing, being "not fairly adequate", "inadequate", "manifestly unfair", and the parties having been denied

the right to "test, explain and refute" the errors of fact and law in the Commission's findings and report, the administrative Order, quasi-judicial in character is void. *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct., 185, 187.

The Santa Fe Case.

In *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, 52 S. Ct. 146, the Supreme Court reversed a District Court with directions to grant an injunction sought by the Santa Fe Railway to set aside an order of the Interstate Commerce Commission. The Order prescribed maximum rates for grain and grain products. The Commission's order was held invalid by the Supreme Court on the ground that the Commission had failed to grant rehearing.

The Commission based its findings upon the pre-depression years, whereas the Order was entered to become effective during the economic depression of the early nineteen thirties.

The Supreme Court said:

> "That record (closed in September 1928) pertains to a different economic era, and furnished no adequate criterion of *present requirements*.
>
> "In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to *existing conditions*, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The Order of the Commission which was thus made effective, and the supplemental ensuing order, cannot be sustained."

In these State Coach Fares Cases the Commission based its conclusions primarily upon the statistics of passenger traffic during the prior and bygone years of the economic depression, and dealt with the year 1942—a war year—as an abnormal one, and not entitled to any consideration in the

prescription of coach fares. The Commission seized upon the statistics for the month of December, 1943, to support its prophecy that the peak of war-traffic had been passed and the railroad traffic and revenues were rapidly declining and would soon revert to the depression level. Apparently the Commission mistakenly thought that the war was just about over in December 1943. Now, two years later we know, and the Court may take judicial notice of the fact, that the end of the war looks farther away in 1945 than it did to the Commission in 1943. The Commission's mistake in prophecy was a grievous one.

North Carolina's petition for further hearing sought to present to the Commission the statistics for the complete year 1943 and the current months of 1944, prior to the date of the Commission's Order in May 1944, and to show the unfairness of the Commission's finding that railroad and passenger revenues had passed the peak and were declining to pre-war levels. North Carolina wanted to prove that the freight and passenger revenues were steadily increasing, for the year 1943 as compared with 1942, and for the year 1944 as compared with 1943, in order that the Commission might base its findings upon the existing economic era of war-swollen traffic and swollen railroad profits and rates of return on investment.

The *Santa Fe Case* and the North Carolina case are alike in principle. The difference is that the Commission's order in the Santa Fe case, issued in the period of the depression, was improperly founded upon the statistics for the normal years which preceded the depression of the nineteen thirties, whereas, in the North Carolina case, the Commission improperly founded its decision upon the fact that it had fixed a maximum fare of 2 cents for the East and West in the *1936 Fares Case*, (not for the South) based upon evidence extending through the y ar 1934, and, in the North Carolina Case, the federal Commission failed and refused to recognize that, in 1942, 1943 and 1944, we were living in a "different economic era" of war-born prosperity and vastly

changed and reversed conditions as compared with the bygone era of depression.

North Carolina asks that the Supreme Court reverse the District Court and hold, as it did in the Santa Fe Case, that the Commission's findings, which are predicated upon the statistics of the bygone era of economic depression of the nineteen thirties, "pertains to a different economic era, and furnished no adequate criterion of present requirements"; that the Commission's conclusions are founded upon "conditions which have been radically changed;" and that the cumulative effect of the seven arbitrary acts, viewed "in their entirety", constituted a "denial of right"; and that "the Order of the Commission which was thus made effective, and the ensuing order, cannot be sustained." (Quotations from the Santa Fe Case.)

The opinion of the District Court appears to regard the Santa Fe Case as an exception never-to-be used again, for the reason that it is "restricted to its special facts" and in that it "stands virtually alone." We did not ask for further hearing "on the ground that the record was stale". We did not ask for "a further cost study based on changed conditions". (See the opinion of the District Court, (Pr. 564) citing *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 64 S. Ct. 1129, 1135, and *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 480, 54 S. Ct. 783.) Our petition was founded upon the same principle which was employed by the Supreme Court in the Santa Fe Case, with the exception that the economic trend in the North Carolina Case is in the opposite direction from the economic trend which was considered in the *Santa Fe Case*.

POINT II. Evidence was wrongfully excluded by the District Court.

The District Court held that evidence not embraced in the record before the Commission is excluded. (56 F. Supp. 606 at page 621). (Pr. 572).

The ruling sounds definite enough, but, in its application to the situation presented to the District Court the ruling is vague, indefinite, and susceptible to differing interpretations.

In our Statement of the Case will be found our "Description of the types and extent of the evidence tendered to the District Court," the ruling made at the hearing before the District Court, and our attempt to construe the District Court's ruling on this point.

A list of bulky documentary evidence was tendered to the District Court. Some of it was offered by the federal Commission, some by North Carolina, some by the Price Administrator and some by the railroads.

The District Court's ruling, taken literally, appears to exclude all of the documentary evidence except the transcript of testimony and exhibits which were received in evidence at the hearing before the Examiner. But, did the District Court intend to rule out the briefs, petitions for further hearing, and answers? Did the District Court mean to exclude those documents which were tendered by the Commission, the Price Administrator and North Carolina and received without objection? Did the District Court mean to exclude the certified copies of the monthly reports, which were not in the record before the Commission, but which were not objected to by the Commission? Did the District Court mean to exclude the annual reports of the carriers to the Commission which were objected to by the federal Commission?

We doubt whether the District Court intended to go that far and exclude *all* of such evidence. Therefore we have selected a list of the documents which we thought that the Court *intended* to *receive* in evidence before it and a list of the documents which we thought that the Court intended to exclude.

We shall not repeat here the forty odd pages in our Statement of the Case in which this subject is treated under the topical heading—"Description of the evidence tendered to the District Court."

Our adversaries can be expected to disagree with our interpretation of the ruling; but they cannot afford to stand out for the interpretation that *all* documentary evidence was excluded except the transcript of record before the Commission. If they contend that, then they should be bound to admit that the certified copy of the Commission's order of January 21, 1942 in Ex Parte 148, and the Hasty Order of August 1, 1942, which was tendered to the District Court by the federal Commission (Pr. 521), and which were not in the record before the federal Commission, was likewise excluded by the ruling (tr. 18). Those orders, which are not in the I. C. C.'s published Reports, are the very head and front of the federal Commission's case. Without them the Commission's case falls. Without them there is no basis for the finding with respect to the reasonableness of the interstate coach fares.

The District Court did not resolve the question raised by the federal Commission's objection to the receipt in evidence of the annual reports of carriers to the Commission (Pr. 115). We contended that the Stipulation, made at the oral argument before the federal Commission, included the annual reports, and the federal Commission contended, with no apparent reason, that that Stipulation was confined to "the monthly statistical reports which had been gotten out since the close of the hearing." (tr. 10) (Pr. 115)

Due to the fact that the District Court did not rule definitely upon these questions, which were raised by objections made at the hearing before the District Court, there is doubt and uncertainty as to what the Court excluded.

In *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 187 the Supreme Court said:

> "Manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.
> "All parties must be fully apprized of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect docu-

ments, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding;".

In the *Orient Divisions Case, United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 288-289, 44 S. Ct. 565, 570, the Supreme Court set aside an order of the federal Commission on the ground, not for lack of trustworthiness of the evidence of the character considered but because the railroads were not put on notice

> "of the evidence with which they were, in fact, confronted, as later disclosed by the finding made."

In two respects this principle is applicable here. The Commission in its Report leaned heavily upon the statistics for the month of December, 1943 as marking the end of war-prosperity in railroad traffic and revenues. That was the month in which the hearing was held. Not until the Commission's report was rendered was North Carolina "confronted, as later disclosed by the finding made," with the evidence upon which the Commission predicated one of its most important findings. The principle of the *Orient Divisions Case* applies here.

Again, it was not until the Opinion of the District Court was rendered that North Carolina was confronted with the Court's finding that evidence not of record before the Commission was excluded, and even then, North Carolina did not know and does not yet know definitely what particular evidence is in the record before the District Court and what particular evidence is excluded.

In view of the uncertainty as to what evidence was before the Commission and, now, what evidence is before the District Court, North Carolina asks that the case be remanded to the District Court with instructions to rule upon the question—what evidence was receivable under the Stipulation made at the hearing before the Commission and what evidence, tendered to the District Court, was excluded.

The affidavits, attached to the petitions, and the corrected affidavits, should not have been excluded by the District Court.

Of grave concern is the act of the District Court in excluding the affidavits of witnesses Downing, Nicholson and Whitnack. They were witnesses in the hearing before the federal Commission. They were present at the hearing before the District Court. Their affidavits were necessary parts of the Petitions of North Carolina and the Price Administrator to set aside the federal Commission's Order. Their supplementary affidavits were corrective. No objection was made to the form of the affidavits or the authenticity of the statistics therein set forth. No objections was made to the qualifications of the witness-affiants, and no request made to cross-examine them. The railroads had ample time within which to file like affidavits to rebut the statistics shown in the affidavits, and the railroads did so. Their affidavits, not objected to, were wrongfully excluded also.

The affidavits set forth and explain statistics taken from the reports of the carriers to the Commission which were made a part of the record by the Stipulation made at the request of the federal Commission during the course of the oral argument before the federal Commission. They contain matter which strictly adhered to like statistics which were treated in the testimony, exhibits, briefs, oral arguments and petitions for further hearing.

There was no attempt here to retry the case before the District Court upon new cost studies or newly discovered evidence foreign to the record before the Commission. There was no occasion for the District Court's reference to the doctrine of the *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 54 S. Ct. 786 in which the Supreme Court held that the Commission was not "required to make a further cost study based on alleged changed conditions." In that proceeding, before the federal Commission

—the Chicago Switching Case—the federal Commission directed the carriers to "make a cost study of switching movements in the District." (at page 477, and 784). They did so. In this North Carolina Case the carriers presented *no* cost study. They made no showing of the cost of the coach passenger traffic *at any time*, and under any conditions. That was the significant omission which should have been taken by the federal Commission as evidence of the strongest character against the railroads. The Commission itself failed and refused to consider and to incorporate in its report the simple mathematical computations, presented by North Carolina and the Price Administrator, from the exhibits of record, and largely from the railroads' own exhibits, which proved indisputably that certain of the Commissions ultimate findings were wholly unfounded and unfair. This situation here has no parallel in the situation which was before this Court in the *Chicago Switching Case.*

North Carolina had no previous opportunity to show these facts. The Commission failed and refused to reopen the proceeding to hear and consider these facts. Unless the District Court is required to consider them North Carolina is denied the opportunity to prove the allegations of its Petiiton to the District Court.

In the foregoing Statement of the Case under the caption "What is in the affidavits," we have explained in some detail that exhibits received by the Commission are founded upon statistics for various years, and part-year and full-year computed upon various parts of the year 1943—the year in which the hearing was held; and that one main purpose of the affidavits was to substitute the actual figures for 1943 for the estimated and computed figures for 1943.

What good reason could the federal Commission advance against substitution of actual figures for estimated figures when the actual figures were to be derived from reports stip-

ulated into the record at the oral argument before the Commission?

We explained that the use of the monthly reports for the early months of 1944 in the petition for further hearing and in the affidavits was to prove the unfairness of the use of the month of December by the federal Commission in its Report. North Carolina had no previous opportunity to do so. Why should the federal Commission seek to stand upon its erroneous findings when the true picture was presented to it in the petition for further hearing? And why should not the District Court receive those figures so that it may decide whether the Commission's findings were untrue and unfair, as alleged in the Petition to set aside the Order?

We have explained further that the Commission knew, when it issued its order in May, 1944, that its findings with respect to the unfair month of December 1943 in the *Alabama Intrastate Fares Cases* (Pr. 69) was untrue and erroneous. The federal Commission knew that from its findings in the subsequent reports in Ex parte 148.

Why is the federal Commission afraid to get into this record the true figures for the early months of 1944, prior the entry of its Order in May, 1944?

Can it be that the federal Commission, to save its face in this case, would exert itself to have the true picture excluded from the consideration of the District Court?

We have shown that the revised figures in the affidavits vary only slightly from those presented in the record, the brief, the oral argument and the petition for further hearing before the federal Commission. We have shown the corrected figures which, in some instances are *less* favorable to support our point, and in other instances more favorable to support our point. The corrected rates of return differ so slightly from those in the exhibits presented to the federal Commission at the hearing as to be insignificant.

The corrected expenses per coach passenger mile are slightly lower than those shown in our Brief, Argument and

petition for further hearing before the federal Commission. All are less than 1 cent.

What has been said in summarized form should suffice to show that these affidavits were not "new cost studies", and followed no new lines of attack, and were largely corrective in form and substance, and were in no sense an attempt to "retry the case" in its entirety before the District Court, or to present any new points of argument or fact which had not been presented to the federal Commission before its Order was entered.

There is nothing novel or out of the way in the presentation of evidence in such manner to a District Court in cases attacking orders of the federal Commission.

In the Santa Fe Case, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, affidavits were submitted to the 3-Judge Court to show the effect of the Commission's order upon the carriers' revenues. They were received and considered. The Commission's order was set aside, largely upon the evidence submitted in affidavit form.

In the Citrus Division Case, *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, extensive oral testimony and exhibits were received in evidence before the District Court, and the accounting methods therein contained were considered by the District Court and the Supreme Court when that case came before it.

In the *Citrus Divisions Case, Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 353, 56 S. Ct. 797, 800, the Supreme Court said:

> "The case was tried by three judges. In addition to the evidence given before the Commission there were offered and received at the trial the testimony of many witnesses and much documentary evidence."

The Supreme Court considered the evidence before the District Court, and held that

> "As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the

Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes *due process of law* for its ascertainment."

(at page 364 (805)

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring *due process of law* for its determination.'"

at page 364 (806).

If evidence is properly received in such cases, where the carriers seek to set aside an order of the federal Commission on the ground that the Commission has not accorded to them reasonable rates (in the *Santa Fe Case*) and reasonable divisions of joint rates (in the *Orient Divisions Case*) where the rates and division fixed by the Commission are alleged to be too low, why are the Price Administrator, and states of Alabama, Kentucky, Tennessee and North Carolina denied the right to present competent evidence before the District Court to show that the Commission has fixed coach fares for non-reserved seat travel in ordinary trains which are extortionately high?

Do the railroads have some superior right of protection from orders of the federal Commission which is not to be equally available to the States, the Traveling Public, and the Price Administrator?

Has the power of appointed Commissions in this country ascended to such dizzy heights as to be beyond the reach of the restraining arm of the judiciary?

Is the federal Commission to sit in the future as the sole arbiter and the supreme unchallengeable authority upon questions of evidence which it will receive and consider, and which it will neither receive nor consider?

To sustain the District Court in excluding such affidavits under the circumstances presented here, would mean that the federal Commission

> "had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat"

Interstate Commerce Com. v. *Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 at page 186.

Evidence was wrongfully excluded by the District Court.

POINT III. (a) The railroads presented no substantial evidence to sustain the statutory burden of proof to justify their proposed increase in coach fares.

The railroads, upon whom the statutory burden of proof rested, presented no evidence to show that the intrastate fare of 1.5 cents, which had been approved by the federal Commission in the 1936 Fares Case, as not unreasonable and which, increased by 10 per cent under Ex Parte 148 had been found to be just and reasonable for the future, was unreasonably low or non-compensatory; and no evidence that the fare of 1.65 cents was unduly low in relation to the cost of the service, or that transportation would be provided at the lowest cost, as directed by The Congress in Section 15a(2) at the proposed fare of 2.2 cents.

On the other hand the evidence proves conclusively that the proposed fare of 2.2 cents is grossly extortionate and unreasonably high in relation to the expense per coach passenger-mile of less than 1 cent—63 one-hundredths of one cent (Pr. 519); that the average passenger operating ratio of the four North Carolina railroads, 52, is lower and more favorable to the railroads than their freight operating ratio, 56; and that their average net railway operating income is yielding an average rate of return on investment

of 18.09 per cent, which is grossly excessive (18.09 per cent before federal income and excess profits taxes) (pr. 520).

These indisputable facts prove that the fare of 1.65 cents was not unreasonably low, that passenger traffic is bearing more than its relative share of the cost of the aggregate rail transportation services, and that the railroads do not need additional revenue.

Therefore the Commission's findings—that the intrastate fares are unreasonably low to the extent that they are less than 2.2 cents, that passenger traffic is not paying its fair share of the transportation services, that the North Carolina railroads need additional revenue to enable them to render adequate and efficient service, and that the intrastate fares burden interstate commerce,—all are without any substantial evidence to support them, and are directly contrary to indisputable evidence.

The reasonableness of the fare.

The District Court's reasoning, with respect to the *reasonableness* of the coach fare in affirming the Order of the federal Commission is founded upon erroneous statements of fact and concepts of law.

There was no searching inquiry into coach fares in Ex Parte 148.

The District Court has misconceived the nature of the case, and has confused the principles applicable to general revenue cases and the federal Commission's findings in a general revenue case, with this particular case which concerns one particular type or class of fare on particular railroads in a particular region.

As to the reasonableness of the coach fare, the District Court labored under the misapprehension that

> "The reasonableness of passenger fares was again submitted to a *searching inquiry* by the Commission in its report of March 2, 1942, in Ex Parte 148, wherein,

following certain wage increases and a showing of other increased costs, it approved an increase of 10 per cent in passenger fares and a smaller proportionate increase of freight rates".

The District Court was mistaken. In that general-revenue case there was no "searching inquiry" of passenger *fares*, and no separate inquiry into coach fares. The Commission considered the freight train service and the passenger train service, from the standpoint of the average net railway operating income of the carriers in the nation in the aggregate, as they were about to be affected by wage increases, and the threatened nationwide railroad strike. The federal Commission made no investigation of the costs, per se, of the varied types of transportation performed in passenger-train service. The Commission made no inquiry into the reasonableness of any charges for coach, pullman, extra-fare-train, commutation, express, milk and cream, or mail transported on passenger trains.

Later, in separate particular proceedings, the federal Commission did make searching inquiries into *commutation* fares, but not into ordinary coach fares. (See Statement of the Case, under the caption "Commutation Fares").

The Commission permitted the 10 per cent increase in the then existing charges for the various types of service in passenger trains without *any* inquiry into the inherent reasonableness of any particular charge for any type of service in any region on any particular railroads. The federal Commission made that clear in several portions of its reports. It referred to "The general character of the evidence" and "its necessarily generalized character", and said that "Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs" (248 I. C. C. at page 606); and that "It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the

case do not permit such refinement" (248 I. C. C. at page 609).

What the Commission did was to *permit* a general nation-wide increase in the then existing passenger fares, *whatever they were.*

The federal Commission in that report recited that the coach fares were then "2 cents per mile in the East and West and 1.5 cents in the South" (248 at page 564). It permitted the increase in the South from 1.5 to 1.65 cents, and without any investigation into the inherent reasonableness of the fares or charges for coach service or any other types of service performed on passenger trains.

The District Court mistakenly regarded that proceeding —Ex Parte 148—as a "*searching inquiry*" into the reasonableness of coach passenger fares, which it was not. It was merely a general-revenue case from beginning to end, and the federal Commission, in it, prescribed no rates, charges or fares for any line in any region. The federal Commission made that clear by saying (248 I. C. C. at page 613) that "Rates and charges increased as herein permitted are not prescribed rates and charges . . ."

This North Carolina Case is a *particular case* relating to one *particular type* of service performed in passenger trains, in one region, on a few certain and *particular lines* of railroad.

The District Court failed to give any consideration to the fact that the federal Commission, having found the fare of 1.5 cents "not unreasonable or otherwise unlawful" in the southern region in the *1936 Fares Case*, found in Ex Parte 148 that that fare, increase by 10 per cent to 1.65 cents would be "just and reasonable for the future."

Nowhere in the *Findings* of Fact in *Ex Parte 148* can there be found any basic or essential findings which would indicate that there had been any evidence, or any separate consideration of, or inquiry into, the inherent reasonable

ness of the then existing coach fare of 1.5 cents in the southern region.

Thus the District Court has failed to recognize the important distinctions between a general revenue case—Ex Parte 148,—and a particular fare case—the North Carolina Coach Fare Case.

The District Court has assumed, in error, that the federal Commission in Ex Parte 148, after a "searching inquiry" prescribed 2.2 cents as a minimum reasonable fare per mile for travel, in ordinary non-reserved-seat coaches in the southern region—which was a serious and a grievous error.

The District Court went on to say that the Commission entered other reports in Ex Parte 148-255 I. C. C. 357, and 256 I. C. C. 502,—and refers to the Hasty Order of August 1, 1942 which authorized the additional increase of 33.3 per cent in the interstate fares of certain southern carriers. But the District Court failed to find and to notice that the Hasty Order was entered upon a new and separate application of certain carriers in the southern region, and was granted without hearing, without evidence and without a Report. That application raised new issues which were not raised by the order of investigation in *Ex Parte 148*. The latter related solely to the question whether all of the railroads in the nation should be permitted to make a general increase of 10 per cent in all rates, fares and charges, whatever they were, under the threatened general nationwide strike and increased operating expenses. That special application for an additional increase in the south of 33.3 per cent had no place or part in the General Investigation. Merely giving it that Docket number—Ex Parte 148,—did not bring it within the issues of the general nationwide increase case.

The District Court's error is deep-rooted. It is founded upon a misconception or misapplication of other cardinal principles of law.

The State Commissions had the right to rely upon the findings in the 1936 Fares Case.

The "searching inquiry" was not made in *Ex Parte 148*, but was made in the *1936 Fares Case*. The "searching inquiry" resulted in the continuation, until February 1942, of the fare of 1.5 cents on important railroads in the south, while the fare was 2 cents in the East and West, and differing fares were maintained by individual lines in different regions.

The fare of 1.5 in the southern region was specifically approved and found to be "not unreasonable or otherwise unlawful" after that searching inquiry. The State Commissions permitted the same fare of 1.5 cents to remain in effect, upon the basis of that "searching inquiry" and the findings of the federal Commission. The State Commissions also permitted the 10 per cent general increase in the intrastate fares of 1.5 cents to become effective at the same time as the interstate fares of 1.5 cents were made effective under Ex Parte 148.

The four southern State Commissions withheld their approval of the 33.3 per cent increase in coach fares in 1942 for the reason that the federal Commission, in permitting such increase in the interstate coach fares from 1.65 cents to 2.2 cents, acted upon a separate application of certain Southern railorads, *after* the Report in *Ex Parte 148*, and without any hearing, or evidence, or report upon that separate application which had no place in Ex Parte 148.

The State Commissions "held the line", under the specific emeregency executive Order of the President, issued under his war-powers, and in conformity with the requirements of the Price Administrator.

The District Court has failed to give consideration, or failed to recognize that, under these circumstances, the State Commissions did what they ought to have done, and that their actions were well grounded in fact, in law, and reason.

The State Commissions, and the representatives of the traveling public who were joined with them, had a *right to rely* upon the findings in the *1936 Fares Case*—that 1.5 cents was not unreasonable or otherwise unlawful for ordinary coach fare service in the southern region, and the finding in *Ex Parte 148* that such fare of 1.5 cents, increased by 10 per cent to 1.65, would be just and reasonable for the future.

The Phillips Case.

The mere fact that in the *1936 Fares Case* the joint Petitioners with North Carolina in this case may not have been parties to the proceeding before the federal Commission, does not deprive them of their *right to rely* upon the findings of the federal Commission in that "searching inquiry" into the reasonableness of the coach fares in the southern region. North Carolina and those joined with the State asserted their right to rely upon those findings of the federal Commission. In *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 35 S. Ct. 444, 445, the Supreme Court said:

> "But the proceeding before the Commission, to determine the reasonableness of the 2-cents advance (in lumber rates), was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate." "The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order".

And so, in these State Coach Fare Cases, the State Commissions and the representatives of the traveling public joined with them, had the *right to rely* upon and obtain the

benefit of those findings of the federal Commission in the *1936 Fares Case.* They were and are entitled to rely upon those findings, which were made after "searching inquiry" and upon adequate and exhaustive evidence with respect to the inherent reasonableness of ordinary coach fares in the southern region under the then existing conditions. No other searching inquiry into the reasonableness of such coach fares has been made by the federal Commission since the *1936 Fares Case.*

Thus the intrastate fares in the southern region of 1.5 cents, increased to 1.65 under the general advance of 10 per cent in the four States following Ex Parte 148, had the double sanctity under our dual system of government of the specific approval of the State and federal Commissions.

Under those circumstances added weight should have been given by the District Court to the point of law—asserted by the States—that the act of the North Carolina and other Commissions in withholding approval of any increase in the intrastate coach fares in view of President Roosevelt's order freezing rates and fares of carriers, and in the absence of any showing by the railroads what relation their expenses per coach passenger mile were bearing to the proposed fare, under changed conditions, after the great increase in non-reserved seat coach occupancy and the consequent reduction in unit cost per non-reserved seat coach passenger mile,—

> "on its face appears to be a legitimate exercise of power, and which has not been shown by clear and satisfactory evidence to operate unjustly and unreasonably, in a constitutional sense against the plaintiff in error (railroad)"

St. Louis & S. F. Ry. Co. v. *Gill,* 156 U. S. 649, 15 S. Ct., 484, 491.

The District Court apparently overlooked the point—stressed by North Carolina—that

"The authority to determine the reasonableness per se of intrastate rates lay with the *state* authorities and *not* with the Interstate Commerce Commission.

State of Florida v. *United States*, 282 U. S. 194, 214, 51 S. Ct. 119, 124.

The District Court and the federal Commission failed and refused to find that the statutory burden of proof to justify the increase from 1.65 cents to 2.2 cents was upon the carriers.

The federal Commission relied upon the Hasty Order of August 1, 1942 as the sole foundation of its finding that the interstate fare of 2.2 cents was reasonable. It had no other ground to rely upon. No evidence in the North Carolina Case was adduced by the railroads with respect to the inherent reasonableness of the interstate rates. The Examiner ruled that the burden was upon them to do so, and, failing that, it was "not subject to attack" and was "not in issue." Under the circumstances it was particularly arbitrary that the federal Commission, in the absence of evidence in the North Carolina Case, went out of the orbit of the case and relied upon the order of January 21, 1942, in a general revenue case which in no wise dealt with the inherent reasonableness of any particular rate on any particular railroad or railroads in any particular region.

The great reduction in expense per coach passenger mile caused by the great increase in car-occupancy.

The District Court failed to consider and did not even mention the point—which was so ardently pressed in North Carolina's brief, oral argument and Petition for further hearing and Petition to set aside the Order—that the railroads, having the burden of proof, failed to show how greatly the great increase in coach-occupancy had reduced the expense per coach passenger mile since the testimony was adduced in the "searching inquiry"—the *1936 Fares Case*.

The railroads proved almost everything else with respect to their reported statistics, except the expense per coach passenger mile. They had the facts. They produced statistics from which it is easy to compute, by simple arithmetic, what the expenses were per coach passenger mile. The fact that they failed to prove the most important single point of all, is evidence of the strongest character against them. *Interstate Circuit* v. *United States*, 306 U. S. 208, 225, 59 S. Ct. 467.

No "reasonable basis" was shown which would warrant a finding that the intrastate fares were unreasonably low.

The District Court said (56 F. Sup.; P. 616) that:

> "It is elementary that, a *reasonable basis* being shown, the fixing of a rate or fare is a matter for the Commission and not for the courts."

But no reasonable basis was shown. The District Court failed to consider that the fixing of the intrastate fare was the function of the North Carolina Commission—not the federal Commission. And the District Court failed to consider that the bare fact that the coach occupancy had so greatly increased since the *1936 Fares Case*, that the resultant expense per coach passenger mile had been greatly reduced, and that the action of the North Carolina Commission in withholding its approval of any increase—in the absence of definite proof of the expense per coach passenger mile—was a reasonable exercise of the state's power over intrastate commerce. The action of the federal Commission in ordering the 33.3 per cent increase in the intrastate coach fare, without any showing by the carriers of the unit expense per coach passenger mile, in relation to the unit revenue per mile (the fare) was not founded upon a *"reasonable basis"* for the exercise of the federal power over intrastate fares.

In the brief, oral argument, and petition for further hearing, North Carolina took the statistics presented in the railroads' exhibits and showed therefrom that the expense per coach passenger mile had been reduced to less than 1 cent. The process is quite simple.

Let us illustrate it simply. If the total expenses per coach mile are 30 cents and 10 revenue passengers ride, the expense is obtained by dividing 10 people into 30 cents, making 3 cents per mile. If 60 people ride in that coach instead of 10, we divide 60 people into 30 cents per coach mile and get ½ cent per coach passenger mile.

In the foregoing Statement of the Case, under the caption "Even a slight increase in car-occupancy causes a sharp reduction in unit expenses per passenger mile," and "A heavy increase in the average coach-occupancy causes only a negligible increase in the expense per coach mile" and "the high increase in passenger earnings was due primarily to the very large increase in car-occupancy in coaches" and "the heaviest increase in car-occupancy was in coaches" and "Exhibit 9 provides other data from which the approximate expense per passenger mile in coaches may be readily computed" we showed that the expense per coach passenger mile in 1943 was only *63 hundredths of one cent.* (Pr. 519).

In the face of this simple showing derived from the railroads own exhibits, who would say that the increase in the fare from 1.65 cents to 2.2 cents had any "reasonable basis" where the expense had gone down to less than 1 cent per mile? If a steel mill produces steel at a unit expense of $63 per ton would that be a "reasonable basis" for an increase in price from $165 to $220 per ton?

The indisputable evidence is that the minimum intrastate coach fare of 2.2 cents prescribed by the federal Commission is extortionate and unreasonably high in relation to the expense of 63 hundredths of 1 cent.

Both the Commission and the District Court have excluded from their Report and Opinion these highly relevant and controllingly vital facts and have failed and refused to receive any further evidence with respect to the expense per coach passenger mile. The order should be set aside for failure to receive and failure to consider such evidence owing to an erroneous view of the law. *Interstate Commerce Com.* v. *Southern Railway*, 105 Fed. Rep. 704; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648, 20 S. C. T. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 21 S. Ct. 516; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 16; S. Ct. 666.

The order of the federal Commission is void for "unreasonableness, departure from statutory standards or lack of evidentiary support". *Interstate C. Com'n* v. *Hoboken Mfrs. R. Co.*, 320 U. S. 368, 64 S. Ct. 159.

The Courts' power to review the evidence before the federal Commission with respect to the reasonableness of the intrastate charges is much broader than the narrow concept expressed by the District Court.

The District Court's concept of the power of the Courts apparently is that the Courts have no authority whatsoever to look into the question of the inherent reasonableness of the charges prescribed by the federal Commission for intrastate applications in Section 13 proceedings.

The District Court said (56 F. Supp. 616) that the Courts,

> "on review of an order of the Commission, may not substitute their judgment for that of the Commission as to its reasonableness."

(Pr. 563). In other words, the District Court's view apparently is that when the federal Commission increases an intrastate rate, there is no going behind that finding to see whether it was right or wrong, and that such a finding is th eultimate step in rate-fixing which is outside of and beyond any control through judicial process.

The Supreme Court has followed an entirely different and broader concept of judicial review of such findings in Section 13 cases of the federal Commission. The Supreme Court has clearly defined a number of judicial limitations upon the power of the federal Commission to fix a minimum intrastate charge based upon a finding of reasonableness.

In *State of Florida* v. *United States*, 282 U. S. 194, 211, 214, 51 S. Ct. 119, 124, the Supreme Court said that the question in Section 13 cases is not the authority of the federal Commission but of "its appropriate exercise," and that:

> The propriety of the exertion of the authority (by the federal Commission) must be tested by its relation to the purpose of the grant and with suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power *must clearly appear.*"

And in holding that this must "*clearly appear*", the Supreme Court went on to say at p. 212 (124), that

> "It must appear that there are findings, *supported by evidence*, of the *essential facts* as to the particular traffic and revenue . . ."

and at p. 214 (124):

> "But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

In the North Carolina Case the District Court should have looked sharply into the evidence to see whether the federal Commission appropriately exercised federal power over

the state fares, and whether the evidence made it *"clearly appear"* that the federal Commission was justified in fixing the reasonableness of the intrastate fare, and that the fixing of the reasonableness per se of the minimum intrastate fare was "supported by evidence", and that there were findings of the "essential facts as to the particular traffic and revenue", in addition to findings that the "intrastate rates on the particular traffic (ordinary coach traffic) were not remunerative or reasonably compensatory".

If the District Court had not held the erroneous view that the power of the Courts in reviewing the findings of unreasonableness of intrastate rates is strictly limited, and if the District Court had held the concept stated in the Florida Case, the District Court would have looked carefully into the evidence as to the inherent reasonableness per se of the intrastate fare, and would have noted that the railroads had failed to make any showing that the intrastate fare was "not remunerative or reasonably compensatory"; that the federal Commission had made no finding that the intrastate coach fare was "not remunerative or reasonably compensatory", and that, on the contrary, the evidence shows by indisputable facts that the then existing intrastate fare and the proposed fare were both extortionately high and unreasonably high and were assisting other traffic to yield excessive and extortionate rates of return upon investment.

Definite restrictions and limitations have been placed by the judiciary upon the power of the federal Commission to fix minimum intrastate rates.

Other decisions, founded upon this broader concept of the commission's power to prescribe minimum reasonable rates for intrastate traffic have placed definite restrictions and limitations upon that power, which the District Court has not recognized.

In *Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675, 684, 63 S. Ct. 834, 838, the Supreme Court (no dissents) said:

"The Interstate Commerce Commission is without jurisdiction over intrastate rates except to protect and make effective some regulation of interstate commerce . . ."

In *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U. S. 541, 32 S. Ct. 108, the federal Commission had prescribed a maximum reasonable interstate rate on forest products—(not even a Section 13 Case and no intrastate rates were involved). The Supreme Court held that the Courts have power to set aside an order of the federal Commission if it (1)

"goes beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates *contrary to evidence*, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an *unreasonable manner* as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

"Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but that the courts will not examine the facts further than to determine whether there was *substantial evidence* to sustain the order."

The District Court failed and refused to apply the "substantial evidence" rule and failed and refused to hold that the order raising the intrastate coach fares was "*contrary to evidence*".

In no previous case have we found a situation comparable to the fact here, where the Commission raised the intra-

state rate from 1.65 cents to 2.2 cents when the full expense was 63 hundredths of one cent.

Since the protecting arm of the Courts will set aside an order of the Commission when the rate fixed is *"so low as to be confiscatory"* (and that can only be determined by the court by an examination of all of the evidence) North Carolina asks that the Supreme Court expand the doctrine of limitations upon the powers of the federal Commission to prescribe intrastate rates by holding that the Courts will set aside an order of the Commission when the intrastate rate fixed is *so patently high as to be extortionate.* The traveling public is as much entitled to protection from fares which are *so patently high as to be extortionate* as the railroads are entitled to protection from fares which are *so low as to be confiscatory.*

In *United States* v. *State of Louisiana*, 290 U. S. 70, 78, 54 S. Ct. 28, 32 the Supreme Court held that, in a proceeding under Section 13 (3) and (4),

> "it is not questioned that the section confers no authority on the Commission to require intrastate rates to be raised *above a reasonable level.*"

In that case the Supreme Court at page 79 pointed to the distinction between a "general revenue" case and a "particular rate case", involving one commodity in a limited area. The District Court's confusion upon this point is the starting point for its erroneous reasoning and concept with respect to the fixing of a minimum reasonable rate for intrastate traffic.

Mere comparisons of the two rates is not sufficient.

The federal Commission, realizing the lack of basic facts which would be necessary to support the requisite finding that the intrastate fare was confiscatory, or non-compensatory or unreasonably low, found that the comparison of the intrastate fare of 1.65 cents with the interstate fare of 2.2 cents was sufficient, saying (258 I. C. C. at page 143) that:

"It is a well settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services."

There is no such rule applicable to the situation presented here.

When two rates are so much per mile, merely to multiply each rate by a given mileage, is just a way of restating the same thing. Is this a comparison of rates which is sufficient to determine the reasonableness of the higher of the two? Is the one unreasonably low just because it is lower than the other?

If this form of reasoning has any appeal to the reasonably minded, then, there can be no longer any occasion for any difference between any interstate and intrastate fares. The intrastate, if lower would have to give way to the interstate rate, as a matter of course and the State would be ousted automatically from exercising any control over the intrastate rates. It is hoped that no approval of that shallow line of reasoning by the Commisison will be accepted and condoned by this Court in this proceeding where "substantial evidence" of the unreasonable lowness of the intrastate fare of 1.65 cents is lacking.

This Court, in *Florida* v. *United States*, 282 U. S. 194, 214, 212, 51 S. Ct. 119 has expressed the rule to be that showing a "mere difference between particular rates on interstate and intrastate traffic is not sufficient." The same doctrine has been stated and followed in other decisions of the Supreme Court.

Troop train-movements.

The Commission considered evidence with respect to the heavy extra expenses incurred in the operation of troop trains. But the charge for troop movements which is lower than 2.2 cents is a matter of contract between the carriers and the federal government, and is not at issue in this proceeding. The evidence relating thereto was improperly

received. Consideration of such evidence as a justification for an increase in ordinary coach fares is arbitrary and unreasonable. The Commisison omitted to say that the lower charges for troop movements were "very remunerative" (Tr. 16-(8)). If troop movements are expensive why not increase the price? Why shove that cost onto coach fares? Why not shift that expense to pullman fares? Why not shift it to commutation fares which are much lower than coach fares? Why not shift it to mail-pay, or milk, or express? The District Court erred as a matter of law in upholding the commission in receiving and considering evidence with respect to the extra heavy expense of troop movements as a justification for an increase in ordinary coach fares.

Thus the federal Court sought to sustain the fixing of a minimum reasonable coach fare for intrastate traffic on three points: first the fact that the interstate fare of 2.2 cents had been approved for the South without hearing, report, or evidence, in the Hasty Order of August 1, 1942, so as to conform to the interstate fares which were in effect in the East and the West; second, a mere showing of the difference between the inter and the intra fare; and third, the extra expenses incurred in the movement of troop trains, which are charged less than the intrastate fare, and which are not at issue.

The three points are untenable. The District Court erred in failing and refusing to find that there was no substantial evidence to support the fixing of a minimum intrastate coach fare at 2.2 cents; that the finding is contrary to the evidence; and that the railroads failed to sustain the statutory burden of proof.

Rate-making principles.

The District Court labored under the erroneous concept that all intrastate rates must be the same as all interstate rates for like services for, otherwise, the State Commissions

would be applying their own ideas of rate-making in fixing their respective intrastate rates.

The District Court said; (at page 619)

> "It would greatly burden if not entirely wreck the transportation system of the country for local commissions to have the power to base intrastate rates or fares on *their ideas* as to how the expense of maintaining an adequate transportation system should be apportioned among the various classes of business carried on by the carriers . . .
>
> "The Commission has fixed the rates and fares on various classes of business with a view of maintaining their efficiency as interstate carriers for the service of the public; and the rate structure so carefully constructed should not be burdened by lower intrastate rates because local regulatory bodies may entertain different theories of rate making."

There is nothing in the evidence or the briefs which would call forth these expressions of the District Court. The District Court's statement is founded upon a misconception of the law and the facts.

None of the four State Commissions is here asserting any new, or novel, ideas or principles of rate-making of of their own. Every rate-making principle which they have relied upon in these proceedings with respect to the reasonableness of the rates conforms with those principles which have been asserted and often adhered to by the federal Commission itself.

The State Commissions are relying upon those rate-making principles which have been accepted by the Courts.

For example, the federal Commission in the *1936 Fares Case* carefully analyzed the unit expenses of the different types of passenger service, in relation to the expenses. The federal Commission recognized the necessity for a lower basis of ordinary coach fares in the south than in the East or West. The federal Commission reduced the coach fare in the East and West to 2 cents and said that the fare of 1.5

cents in the south was not unreasonable or otherwise unlawful. If it was lawful to have different fares in the south up to August 1, 1942, why did it become unlawful on August 1, 1942? There are no findings in Ex Parte 148 or the Hasty Order of August 1, 1942 which answer this question.

In *Intrastate Class Rates in New Jersey*, 203 I. C. C. 357, the federal Commission said, at page 362 that:

> "The law does not require uniformity between interstate and intrastate rates except where it is *clearly necessary* to the proper regulation of interstate commerce."

In *State of Florida* v. *United States*, 282 U. S. 194, 212, 51 S. Ct. 119, 124, the Supreme Court said:

> "The (federal) Commission has no general authority to regulate intrastate rates, and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."

The concept of the District Court, if affirmed and generally adopted would mean the elimination of the power of the states to regulate intrastate charges of carriers.

The District Court's line of reasoning would shut off any zone of reasonableness where the differing intrastate and interstate rates are both upon a reasonable basis, and within the zone of reasonableness.

The federal Commission and the Courts have asserted the principle of rate-making that there is a zone of reasonableness above which and below which the carriers may not go in publishing rates.

In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, 55 St. 462, 465, The Supreme Court said:

> "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself."

The Courts have followed that principle also. And yet, in this case, the Commission recognized that the 1.5 cent coach fare in the south and the 2 cent fare in the East and West were within the "zone of reasonableness", but in the North Carolina case the federal Commission holds, without any evidence or finding on this point, that there is no zone of reasonableness, and that the *maximum* fare which it has prescribed for the East and West is the reasonable *minimum* fare for the south.

Another example. In the *1936 Fares Case* and the *Eastern Fares* Cases which followed it, the federal Commission studied with care the relation of standard coach fares to the fares for other types of passenger service and passed upon the relationship of the coach fares to pullman car fares, and the relation of coach fares to deluxe streamlined reserved-seat coach trains, before fixing the fares for any of these types of passenger service, and found that the prior higher fares had driven away the business and that the lower fares would attract increased total revenues, and that the trouble was not with the coach fares but with the higher-valued pullman fares. In the Statement of the Case above, under the caption "The 1936 Fares Case", and subheadings thereunder, we have set forth other important factors and principles which were employed by the federal Commission in arriving at its ultimate findings in the *1936 Fares Case*. North Carolina is relying upon those principles here.

Another example. The federal Commission in Ex Parte 148 recognized the necessity for the separate treatment of "commutation fares", under the new era of economic conditions and has dealt separately with commutation fares in a number of particular cases. Why did the federal Commission fail and refuse the Petitions to investigate in like manner the ordinary coach fares under like changed conditions?

Another example. In the *1936 Fares Case* the federal Commission gave separate study to the matter of the value of the passenger services to the traveler, and found that the service in the deluxe streamlined reserved-seat trains and the extra fare trains was so superior to ordinary coach service as to warrant *higher* fares because the value of the service is more than the value of service in ordinary trains with non-reserved seat overcrowded coaches. That point was asserted by North Carolina, and evidence was submitted to prove the point. Why did the federal Commission apply that well known rate making principle in the *1936 Fares Case* and ignore it in the North Carolina and other State Fares Cases?

Thus the rate-making principles which the State Commissions employed in the coach fare cases before them were the same well-established principles which the federal Commission itself had employed and given expression to in the *1936 Fares Case* and other cases, and later confirmed by the Courts. The States presented no new or different rate-making schemes of their own. They were relying upon the principles which have become established by the reports of the federal Commission and the Courts.

The District Court erred in holding the concept that an increase in intrastate fares to the interstate basis is essential as a prophylactic to prevent the State Commissions from adopting some conflicting and different rate making schemes of their own.

Nothing in the record in these cases justified the District Court's discourse upon this subject.

Thus the federal Commission's act in prescribing a minimum reasonable fare of 2.2 cents for travel in non-reserved seat coaches in ordinary trains in intrastate commerce in North Carolina and the three other southern states, was unreasonable, contrary to indisputable facts, contrary to the evidence, without substantial evidence to support it, and an unwarranted invasion of the authority of the States.

The District Court, in upholding the Order of the Commission, fixing minimum reasonable coach fares in North Carolina was guided by misconceptions as to the facts and as to the principles of law which govern the judicial review of Section 13 orders of the federal Commission.

POINT III (b). The evidence negatives the need of increased revenues from coach traffic or revenues from all traffic.

Further on that point, attention is called to the fact that the Price Administrator tendered evidence, which was not considered or reported by the Commission or the District Court, showing conclusively that if the interstate coach fares on respondents' lines, were reduced to the intrastate level of 1.65 cents, the carriers' passenger operating ratio would, even then, be the splendidly low figure of 65.2 per cent (Pr. 448, 444). The Commission and the District Court erred in failing and refusing to receive and consider that evidence. The excellent condition revealed by the foregoing would contribute to the return on investment in excess of a fair rate.

Revenue-burden—discrimination.

The federal Commission's finding, that the "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service", (258 I. C. C. 133, at page 155) (Pr. 95-96) is without any substantial evidence to support it, is contrary to indisputable facts, and the report contains none of the basic findings which are requisite to support that ultimate finding.

Commissioner Splawn, in his scholarly dissent said that:

> "There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service,

> or that there is any deficiency in respondents' revenues from their passenger and freight traffic as a whole. As a matter of fact it does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by section 15a."

(258 I. C. C. 133, at page 160) (Pr. 102-103).

Further on that point, attention is called to the fact that the Price Administrator tendered evidence, which was not considered or reported by the Commission or the District Court, showing conclusively that if the interstate coach fares on respondents' lines were reduced to the intrastate level of 1.65 cents, the carriers' passenger operating ratio would, even then, be the splendidly low figure of 65.2 per cent (Pr. 448, 444). The Commission and the District Court erred in failing and refusing to receive and consider that evidence. The excellent condition revealed by the foregoing would contribute to the return on investment in excess of a fair rate.

The fact that the respondents are earning an average rate of return of 18 per cent before federal income and excess profits taxes is conclusive proof that the Commission's finding of revenue need is directly contrary to indisputable facts.

The fact that the four North Carolina railroads, whose fares are at issue in the North Carolina case, are experiencing such an average highly favorable passenger operating ratio which is lower than their freight operating ratio, is conclusive proof that the passenger traffic is paying a little more than its fair share of the total transportation expenses. The Commission's finding on page 155, that

> "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues,"

(Pr. 95) is contrary to these indisputable facts, and is without evidence to support it.

In the *1936 Fares Case* and the *Eastern Fares Cases* the findings were that the trouble was not with the coach fares but with the pullman and parlor car fares. Since that time the average coach-occupancy in the non-reserved seat trains has expanded to many times the average in the early nineteen thirties; the troop train fares are lower than the intrastate ordinary coach fares, commutation fares are lower than the standard coach fares, and hence ordinary coach fares are paying relatively more than any other type of passenger traffic towards creating the extremely profitably low passenger operating ratios of these North Carolina railroads. These indisputable facts preclude any finding of the federal Commission to the contrary that the carriers were entitled to any increase in the intrastate ordinary coach fares of these four North Carolina lines, or that such coach fares cast any revenue burden upon interstate commerce, or that they were so low as to result in unjust discrimination against interstate commerce from a revenue standpoint.

The indisputable facts conclusively negative the need of any increased revenue from coach fares, or increased revenues from all traffic of these four respondent North Carolina railroads.

POINT IV. Rates of return should be computed before, not after, federal income and excess profits taxes.

The federal Commission on page 138 of its Report said that the Price Administrator, in the North Carolina Coach Fares Case (Pr. 76)

> "also submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before federal income taxes more than a fair return on various book investment

> bases computed by the witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce."

The federal Commission erred in failing and refusing to disclose that the average rate of return of those carriers was about 18 per cent before federal income and excess profits taxes—a vital and highly important fact.

On page 149 of the report (Pr. 89) the federal Commission found that

> "The relation of net railway operating income to investment in railway property including cash, material, and supplies, for these respondents (in Kentucky) reflects average rates of return *after* Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent."

The federal Commission erred in failing and refusing to show the return, so computed, for 1943, which was of record.

The federal Commission, upon the basis of these figures, then found that (Pr. 89)

> "The evidence here before us does not indicate that the passenger traffic of these respondents as a group *is* producing more than a fair return."

Attention is directed to the fact that no such finding is made in the North Carolina case with respect to the four North Carolina railroads and to the fact that the finding, in 1944, was based upon rates of return after federal income taxes for 1942, omitting the year 1943. Therefore, although the Commission has the 1943 estimated rates of return both before and after federal income taxes in the evidence before it when its decision was reached—March 25, 1944, it made a finding in the *present tense* and failed to show the rates of return upon which the "present" finding was made. There are no basic findings or evidence to support that finding. It is contrary to the indisputable facts which were presented

to the federal Commission and contrary to the more highly refined and accurate figures which were presented in the petitions for further hearing and in the petition and affidavits presented to the District Court. If the basic figures which were requisite to that "present" finding had been set forth in the Commission's report, the facts would have shown indisputably that the finding was wrong. The only way that the Commission could avoid its predicament and uphold that finding was to leave out of its report the basic findings as to what were the rates of return in 1943 on all traffic and on passenger traffic.

We have shown elsewhere that the passenger traffic of the North Carolina railroads was earning a higher rate of profit than the freight traffic or, freight and passenger combined (Pr. 405).

It is clear that whatever findings were made as to rates of return on all traffic or passenger traffic in the North Carolina Case or the Kentucky Case, the federal Commission based its findings on net railway operating income *after* charging against income the federal income and excess profits taxes. This point of law was stressed before the District Court, which failed to rule upon it.

In *Reduced Rates, 1922*, 68 I. C. C. 676, at pages 682, 683, 684, the federal Commission discoursed at length upon this very question—whether rates of return on investment should be computed on net railway operating income before, or after deducting federal income taxes from income. The Commission at page 734 fixed 5.75 per cent as a fair rate of return upon the aggregate value of the railway property of the carriers. And the Commission said, at page 683,

> "Under paragraph (3), above quoted, rates are to be so adjusted that carriers as a whole or in designated rate groups will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return. If this were realized in any instance the carrier would receive that return over and above all taxes, including the federal tax on income, and if the fair

return as determined and made public by us was 6 percent the carrier would hold that return "tax free" in the sense that after payment of its income tax it would still have left the 6 per cent. Railway corporations, like all others, are subject to income taxes which, since January 1, 1922, amount to 12.5 per cent on their net income less deductions computed as provided in the income tax law. 42 Stat. L. 277. In our view railway corporations should, like other corporations, *pay their Federal income taxes out of the income*, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it to retain the designated fair return over and above the tax."

In *Increased Railway Rates, Fares and Charges*, 1942, 248 I. C. C. 545, twenty years later, the federal Commission was still holding firm to that carefully considered point in *Reduced Rates, 1922*, quoted above, and repeated at page 556 the following finding from the *1922 Case:*

"railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it (them) to retain the designated fair return over and above the tax."

Although this point was pressed before the federal Commission and the District Court, the federal Commission ignored it and the District Court failed and refused to consider it. The District Court upheld the findings of the Commission, based upon rates of return *after* federal income and excess profits taxes.

The Commission's action was arbitrary and the Court's confirmation of the ultimate findings of the Commission is the equivalent of saying that the Commission was right in law in computing rates of return *after* federal income and excess profits taxes. The District Court erred in law, in failing and refusing to hold that rates of return should be computed *before* federal income and excess profits taxes, and as computed in the exhibits and testimony presented by

the expert economist of the Office of Price Administration —Mrs. Doris Whitnack (Pr. 56A).

The Courts will not sustain an order of the Commission based upon findings which display a misconception of law as to conceded or undisputed facts. *Stickney* v. *Interstate Commerce Commission,* 164 Fed. Rep. 638.

In view of the extremely high profits of the railroads under war-conditions it is of grave importance that this question of law be settled. Let us repeat the expression of Commissioner Joseph B. Eastman (deceased) upon this point in *Increased Railway Rates, Fares and Charges,* 1942, 255 I. C. C. 357, at page 403:

> "The matter has another aspect, not so fundamental but yet of importance. A considerable number of the railroads are now paying in large amounts, not only income taxes, but also excess-profits taxes. Public utility corporations are surely inappropriate mediums for collecting taxes of this character from the public which they serve. The fact that such taxes are collectible is always an incentive, also, to improvident or unnecessary spending."

We ask that the Supreme Court hold that the order of the federal Commission, which is based upon findings with respect to rates of return "after" federal income and excess profits taxes, and which fails to report or consider the rates of return of record which are computed "before" such taxes, is founded upon an erroneous concept of law.

POINT V. Coach fares cannot lawfully be increased to compensate for passenger deficits in former years.

The plain import to be gained by a reading of the entire Report of the federal Commission is that the Commission pushed entirely out of mind the conditions during the war-years, commencing with December 1941, up to the time of the entry of its Order in the North Carolina Case in May, 1944, in arriving at its ultimate findings, and based its

conclusions upon the statistics of operations for the bygone year of economic depression in the nineteen thirties.

The federal Commission's ultimate conclusions are based upon the concept that the railroads are entitled as a matter of right and law to continue to charge rates and fares which will yield them excessive profits during the existing economic era of war-born prosperity for the railroads as a means of offsetting and recovering their losses from passenger operations in the bygone era of economic depression.

The Commission was well aware of the greatly changed conditions, mentioning them in *Ex Parte 148*, and in relating the evidence in the North Carolina Case but refused to base its findings in the North Carolina Case upon the existing and greatly changed conditions, although the evidence was before it with respect to the current years of prosperity for the railroads, commencing in 1941 and extending through the date of its Order of May 8, 1944.

Pages 137 and 138 (Pr. 76-78) of the federal Commission's report contain full recitals of the passenger deficits of the railroad-respondents in the four State Coach Fare Cases. And the federal Commission shows the deficit years of 1936 to 1941, inclusive, but shows only one of the war years—1942, in arriving at so called average deficits for a 7 year period, although the system figures for the seven respondent Kentucky railroads were available for the year 1943. (On page 149 the Commission sets forth system figures for the year 1943 compared with 1942 (Pr. 89)).

Although this Point was pressed before the District Court that Court made no direct finding about it. The District Court's reasoning indirectly disposes of the question upon a tangent line of thought. The District Court labored under the misapprehension that the evidence in the North Carolina Case related solely to a single war year, and the District Court said:

(56 F. Supp. at page 616 (Pr. 563-564))

"It is well settled that ordinarily the experience of a single year is an unsafe guide in fixing rates".

The District Court appears to uphold the Commission on the ground that the statistics for the year 1942—one war-year—represented abnormal conditions which the federal Commission was justified in pushing aside. Both the Commission and the District Court failed and refused to consider, as requested, the fact that at the time of the entry of the Commission's order in May 1944, and at the time of the hearing before the District Court in July 1944, the war conditions had been continuing since December 1941, about two and a half years, and that there was reasonabe expectancy that the war conditions would continue for a number of years in the future.

Both the Commission and the Federal Court indulged in a presumption that 1942 was the one and only "abnormal" year, whereas the evidence reported by the Commission (258 I. C. C. at page 149 (Pr. 89)) for the year 1943 shows plainly that the passenger revenues, as well as the total revenues of seven southern railroads, increased enormously in 1943 over 1942, and that the total operating ratio in 1943, 58.2, was slightly more favorable to the railroads than the ratio of 58.7 for 1942 (Pr. 89).

The District Court erred in fact in viewing the evidence as relating to only one year of changed economic conditions, and defining 1942 as an abnormal year, in view of the indisputable fact that the revenues and net revenues in 1943 were greater than in 1942, and the matter of common knowledge, of which the District Court should have taken judicial knowledge, that this nation is still at war, with indications that the existing economic conditions will continue for several more years at least.

The method of reasoning of the District Court indirectly upholds the Commission's action in increasing intrastate fares of the southern carriers as a means of offsetting passenger deficits in the bygone economic era. The District Court erred in failing and refusing to find, as requested, that the Commission erred as a matter of law in increasing

the intrastate coach fares so that the railroads might continue to earn excessive profits under existing changed conditions as a means of recouping their passenger deficits in the bygone era of economic depression. The Supreme Court in the *Natural Gas Case, Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 62 S. Ct. 736, held that "regulation does not insure that the business shall produce net revenues". At page 590 (745) the Supreme Court said:

> "But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. Galveston Electric Co. v. City of Galveston, 258 U. S. 388, 42 S. Ct., 351, 66 L. Ed. 678; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 447, 23 S. Ct. 571, 573, 574, 47 L. Ed. 892. The deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."

We ask that the Supreme Court hold that the Commission and the Court erred in the concept that the railroads should be allowed to earn excessively high profits and rates of return (18 per cent) under existing conditions, and during these war years as a means of recouping their deficits from passenger operations in the bygone era of economic depression.

POINT VI. Streamlined trains and troop movements.

The federal Commission erred in considering the extra expenses and costs that pertain exclusively to the operation of streamlined trains and the movement of troops as evidence justifying an increase in fares for travel in antiquated non-reserved seat coaches in slow trains.

The federal Commission in its Report has laid much stress upon the testimony of the railroads that the railroads

> "have expended large sums of money in remodeling and air conditioning their passenger equipment".

(258 I. C. C. at page 141), (Pr. 79) and in providing Diesel-powered locomotives for streamlined trains; and that the handling of troop trains entails especially heavy extra expenses. (258 I. C. C. at page 141) (Pr. 79). The federal Commission recites other items of added expense which are incident to passenger traffic as a whole.

None of these extra expenses for deluxe stream-lined trains or for troop movements, are attributable in any degree to ordinary overcrowded non-reserved seat coach travel. Nor are the other items of added expense, which the federal Commission recites, directly attributable to coach travel alone.

The evidence is indisputable that North Carolina intrastate travelers are practically prohibited and excluded from using the expensive fast deluxe streamlined trains with comfortable reclining reserved seats, and therefore no part of the return on that added investment in streamlined trains can lawfully be charged to travel in antiquated, overcrowded, non-reserved-seat, dirty, ill-lighted and ill-ventilated antiquated coaches which are typical of local travel in the four states.

In the *1936 Fares Case* the federal Commission had specifically held that fares in these deluxe fast streamlined trains might be *higher* than ordinary coach fares, but the railroads in the south did not avail themselves of that opportunity. The federal Commission in the *1936 Fares Case* recognized the difference between the value and cost of the service in reserved-seat streamlined trains and non-reserved seat trains. In the North Carolina Case the federal Commission failed and refused to take into consideration

the differentiation, which it had made in the 1936 Fares Case, between the cost of travel in ordinary non-reserved seat coaches and in luxurious reserved seat coaches in streamlined trains.

The increased aggregate expenses of all passenger train services were considered in Ex Parte 148; and a 10 per cent increase was permitted in civilian passenger fares in coaches and pullmans. Therefore, whatever added general expenses were attributable to all passenger traffic have been accounted for in the 10 per cent increase.

But, no 10 per cent increase was placed upon commutation fares, which are much lower than standard fares. They were treated separately, in some instances the proposed increases in commutation fares were denied, Chicago-Commutation Fares, I. C. C. No. 28974; and in others allowed in whole or in part, *Passenger Fares of Hudson M. R. Co.*, 256 I. C. C. 507. In other instances the railroads withdrew their applications before the Commission rendered its findings. Commutation Fares—New York, I. C. C. No. 28973 and—Philadelphia—Camden, I. C. C. No. 28975.

In Commutation Fares—Chicago, Ill., District, 258 I. C. C. 725 (I. C. C. Docket No. 28974) the federal Commission conducted a separate inquiry jointly with the Illinois State Commission, into the reasonableness of a proposed increase of 20 per cent in commutation fares between the Chicago district and points in southeastern Wisconsin, or northwestern Indiana or southwestern Michigan.

That is the type of procedure which is contemplated by Section 13 (3) of the Act, and which should have been adopted for these four southern states coach fares cases.

The Commission commented upon the lack of uniformity of commutation fares in the Chicago District, but did not compel uniformity in them.

The Federal Commission held the carriers to the statutory burden of proof and found that the cost data submitted by the railroads cannot be accepted as accurately reflecting

the cost of the commutation service of any respondent. A similar finding should have been made in the North Carolina Case.

The federal Commission found in the Chicago District Case that:

> "respondents' revenues derived from commutation traffic have been steadily increasing; that the passenger operations as a whole of each respondent are making a substantial contribution to its present net earnings which are considerably in excess of the earnings of the pre-war years; and that a general commutation-fare increase is not necessary (1) to maintain an adequate national transportation system, (2) to maintain essential commutation service by respondents, nor (3) to carry out the national transportation policy declared in the act."

> "We, therefore, conclude that respondents have not justified any general increases in their commutation fares in the Chicago district, and that the commutation fares under consideration have not been shown to be unreasonable or otherwise unlawful."

The Commission said that the commutation fares, which it found not unreasonable, ranged from 0.6 to 1.6 cents a mile.

Travelers on commutation tickets can ride in the same coaches in the same trains, alongside of travelers who pay the standard coach fares. And yet the same Commission which authorized an increase of 33.3 per cent in the ordinary coach fares in the southern states, in addition to the 10 per cent general increase, without hearing, report or order, found that increases in commutation fares in the wide Chicago District, ranging from 0.6 to 1.6 cents per mile, were not unreasonable and that no percentage increase in those fares was justified.

That investigation was instituted April 28, 1943, prior to the order instituting the investigation into the ordinary

coach fares in the four Southern states—October 13, 1943; but in the same year. (Pr. 141).

Thus the Commission's entire action and orderly course of procedure and line of reasoning in the Chicago-District Commutation fares was exactly opposite to its action, procedure and reasoning in the four State Coach Fares Cases.

No increase was authorized in "furlough" fares. On the contrary, on October 1, 1942, at the time when the interstate fare of 1.65 cents in the south was increased to 2.2 cents under the Hasty Order of August 1, 1942, the round-trip fares for personnel of the armed forces etc., were *reduced* to 1.25 cents per mile.

The evidence shows that the charges paid by the government for troop train movements—which, according to the railroads' testimony entailed such extraordinarily heavy expenses, were "very remunerative" (tr. 16-18). But the charges for these movements are for interstate travel, and are not regulated by the North Carolina Commission.

Before the Commission we did not ask, and are not asking here, that separate fares be prescribed for any of these types of coach service-deluxe reserved-seat coach service, troop train service, furlough service or commutation service. The point we made was that, in spite of the added cost and value of streamlined coach service, the extra heavy expenses of troop train movements, the reduced furlough fares and the non-addition of the 10 per cent increase to these latter types of coach service, (under the combined types of passenger fares) the passenger operating ratios since Pearl Harbor have been extremely low and over-profitable to these southern railroads, the average coach car occupancy has risen to unprecedented heights, with resultant reduction in the expense per coach-passenger mile far below the then existing intrastate fare of 1.65 cents—even less than 1 cent,—and the passenger traffic is contributing relatively more than the freight traffic in producing the extortionate rates of return—18 per cent before

federal income and excess profits taxes; and that, under these circumstances, the federal Commission's consideration of the extra costs of streamlined trains, and troop movements as justification for an increase in intrastate coach fares, was arbitrary and unreasonable.

Coach fares for civilian travel in non-reserved seat, antiquated coaches in slow trains cannot lawfully be increased to meet the added and extra expenses of streamlined trains and troop movements.

The Supreme Court held in *Northern P. R. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585, 35 S. Ct., 429, 433, that the outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned.

The federal Commission's assignment to ordinary coach travel of the extra expenses of streamlined trains—which North Carolina travelers are practically prohibited from using,—and the extra heavy expenses attributable directly to troop train movements, was a mistake in law. The evidence relating to the extra investment and expenses of streamlined trains and troop train movements should have been excluded. The ultimate findings, based on these errors of law cannot be sustained.

POINT VII. There is no proof of preference and prejudice between persons.

The federal Commission found (258 I. C. C. at page 154) (Pr. 95) that the lower intrastate coach fares resulted in

> "the undue and unreasonable advantage and preference of intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers."

The District Court upheld that finding. There is no evidence to support it.

No travelers in other states intervened on behalf of the railroads or testified in the North Carolina Case. No inter-

state traveler has complained to the federal Commission of any undue prejudice as between interstate and intrastate travelers.

Only an interstate traveler, or travelers, would have been competent to complain of undue prejudice between persons or to testify that rates or fares operated to his or their disadvantage or injury.

There is a total absence of any such allegation or proof of undue prejudice against interstate persons.

Undue prejudice between persons is prohibited by Section 3 (1) and Section 13 (4). The phrases of both sections are almost identical. The phrase in Section 3 (1) is:

> "any undue or unreasonable preference or advantage to any particular person" . . .

and the phrase in Section 13 (4) is:

> "any undue or unreasonable advantage, preference, or prejudice as between persons" . . .

In many cases before the federal and state commissions, and before the courts, the question has been raised as to what kind and extent of evidence is essential to support a finding of "undue prejudice" within the meaning of the quoted phrases from Sections 3 (1) and 13 (4).

In many cases the railroads, when defendants, have strenuously insisted that an allegation of undue prejudice between persons must be buttressed by convincing proof, and that strict proof should be required as an indispensable requisite to a finding of undue prejudice between persons.

The federal Commission sustained the railroads' argument on this question in *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.*, 172 I. C. C. 319, 333, 334, and said that

> "While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. They may

not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference. *Florida* v. *United States*, 282 U. S. 194. The evidence must ordinarily establish that the alleged prejudice and preference constitute a source of undue disadvantage to one party and of undue advantage to another, . . ."

"No allegation is made, and no evidence has been introduced tending to show, that the intrastate rates on the commodities alleged to be preferred are so low as unduly to burden or discriminate against interstate commerce. On the contrary, complainant states on brief that they are reasonable. The allegations of violations of section 13 must, therefore, be presumed to rest on the provisions of paragraph 4, which prohibit undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other. No specific persons or places are alleged to be preferred. We are asked to make a broad finding that the intrastate rates applicable on road oil between all points in *four States* and on asphalt between all points in three of the same and two additional States are in violation of Section 13. Evidence to sustain an order finding that intrastate rates are violative of Section 13 in that they unduly prejudice persons or places must *be of equal dignity and probative value as the evidence required to sustain a finding under section 3.*

The Commission found in the *Barrett Case* that the intrastate rates in five states were not shown to be in violation of Section 13.

The issue of prejudice under Section 13, in the Barrett Case—a leading case on this particular subject, and one often quoted and relied upon by the railroads,—is similar in many respect, to the question presented in this North Carolina case.

Commissioner Splawn's scholarly dissent explains with clarity and precision the applicability of the sound legal

principle of the *Barrett Case* to the facts and circumstances in these intrastate coach fares cases.

All that Dr. Splawn has said on this subject, in 258 I. C. C. at pages 156, 157, and 158 is apt here. Only its length constrains us from reprinting it here in its entirety.

Dr. Splawn points out that: (P. 157)

> "no persons who pay the higher interstate fares and no localities are appearing herein to complain of undue prejudice and preference, or, without complaining, have testified that they are in any wise injured, and so far as these records disclose, none has complained to respondents. Under these circumstances we would not even have before us a complaint under Section 3(1), much less the evidence on which to base a finding of a violation of that section. Respondents do not ask for relief for any particular persons or places, but seek State wide orders."

Dr. Splawn then went on to discuss the *Wisconsin Fares* and *New York Fares Cases*, in relation to this same question of prejudice between persons. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 42 S. Ct. 232, and *State of New York* v. *United States*, 257 U. S. 591, 42 S. Ct. 239. In the Wisconsin Fares Case the Supreme Court said that

> "we cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone." (at page 580)
>
> "Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the interstate Commerce Commission has found to be fair to interstate commerce."

(at page 590, 591). Both the *Wisconsin Case* and the *New York Case* were *general revenue* cases and dealt with no

particular rates or fares for any particular types or classes of service; and they grew out of Ex Parte 74, *Increased Rates*, in which horizontal increases were permitted by the Federal Commission.

Dr. Splawn further said (258 I. C. C. at page 158) that:

> "In these (four southern states coach fares) cases there is no evidence whatever of competition or injury. The Court found (in the *Wisconsin Case*) that there was evidence which would support a finding of undue prejudice and preference against a large class of fares...
>
> "If the order of the Commission there (in the *Wisconsin Case*) could not be sustained as an order to remove undue prejudice and preference between persons and localities, what can be said in support of the State-wide orders here in (four southern states coach fares cases) which are unsupported by evidence beyond the mere difference in fares?"

North Carolina asks that the Supreme Court hold that the federal Commission's finding of undue prejudice as between persons was without any evidence to support it; and that the District Court erred in affirming that finding of the federal Commission.

POINT VIII. Uniformity.

The federal Commission has no power to order an increase in intrastate coach fares simply to bring about "uniformity".

The District Court's line of reasoning condones the act of the federal Commission in fixing a minimum reasonable intrastate coach fare at 2.2 cents for the purpose of effecting "uniformity" of the intra with the interstate coach fares, upon the hypothesis that mere proof or statement that there is a difference in fares is sufficient, in law, to condemn the intra, and sufficient in law to warrant the Order requiring the increase to the interstate level. That

concept of the District Court is revealed by the importance attached in its Opinion in two things: the Louisiana Case, and uniformity in other than these four states.

The Court said (on page 619) (Pr. 569) that:

> "the rate structure so carefully constructed should not be burdened by lower intrastate rates because local, regulatory bodies may entertain different theories of rate-making. These observations apply with *peculiar force* in the case at bar, where it appears that the interstate fares fixed by the Commission have been accepted as reasonable intrastate fares by 44 out of 48 states of the Union. In the language of the *Louisiana case, supra,* there is nothing in the conditions prevailing in the other four states 'so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable'."

That line of reasoning is founded upon two erroneous concepts.

The *Louisiana Case, United States* v. *Louisiana,* 290 U. S. 70, 54 S. Ct. 28, was a *general revenue case.* The federal Commission, in the *Fifteen Per Cent Case* had permitted general horizontal increases in rates in the form of "surcharges", in order to provide much needed revenue to the transportation system generally. The Commission there was acting under Section 15 (a) (2) of the Act—the "revenue need" Section. In a Section 13 proceeding the federal Commission ordered a horizontal increase in the Louisiana intrastate rates on the same percentages as interstate rates, whatever they were. There was no inquiry into the measure of any particular rate on any particular road in any particular region. This Court recognized that in a *general revenue* case under section 15 (a) (2) the Commission necessarily had to "deal with the carriers of the nation as a whole or in broad classes." The Supreme Court upheld the order of the federal Commission, clearly distinguishing the principles applicable in that general revenue case from those ap-

plicable in particular rate cases, such as the *Florida Case* 282 U. S. at page 211.

The District Court, unmindful of that distinction, unmindful of the fact that the North Carolina fare of 1.5 cents had been found "not unreasonable" for coach travel in the south, unmindful that that fare, then applied on intra and interstate traffic had already been increased by 10 per cent under the general-revenue case, Ex Parte 148, unmindful—that the fare of 1.65 cents had been found to be "just and reasonable for the future," based its conclusions upon the erroneous hypothesis that these four State coach fare cases were *general-revenue* cases also, like the *Louisiana Case.*

The District Court formed its conclusions upon the theory that the federal Commission had the power in this case to require "uniformity" for the sake of uniformity alone, even when the railroads, upon whom the burden of proof rested, failed to aduce any evidence before the Commission as to the intrinsic unreasonable lowness of the intrastate coach fare of 1.65.

The second erroneous concept of the District Court's line of reasoning is that all persons in the United States who travel in coaches other than pullmans or parlor cars, pay the same uniform fare of 2.2 cents per mile; and that the order of the federal Commission in the *1936 Fares Case* simply made the *one* fare the *uniform* coach fare throughout the nation. In our Statement of the Case we have shown that no such absolute uniformity exists.

The ordinary coach fares on numerous lines of railroad differ ranging up to as high as 5 and 6 cents per mile. Even in the south, from the year 1932, different ordinary coach fares have been in effect on different lines of railroads in in different portions of that region. Different types of coach fares have been in effect in different states. A different basic coach fare was approved for the south than that prescribed for the East and West. In certain states and

regions extra fares have been charged for travel on special types of trains and "extra fare" trains. Commutation fares, much lower than the ordinary coach fares, have been in effect in many portions of the country, under varying conditions, with fares ranging from 0.6 cent to 1.6 cents per mile. Fare of 1.25 cents have been available to the members of the armed forces in uniform, nurses, etc. It is common knowledge that special round trip and excursion fares of various types under widely varying conditions have been common throughout the country. Even during the progress of the case before the North Carolina Commission, there were marked differences in the fares of different carriers even in North Carolina. The North Carolina Commission permitted the additional increase of 33.3 per cent to those weak lines which proved that they were in need of additional revenue for their passenger operations, such as the Clinchfield and the Norfolk Southern, even though they were earning more than a fair return upon their aggregate traffic (Pr. 28).

Thus the absolute nationwide uniformity in coach fares, which the District Court had in mind, did not then and does not now exist.

Prescribing for intrastate traffic a "uniform" rate of horizontal increases in charges for the general revenue purposes of section 15 (a) (2), as in the *Louisiana Case*, is a wholly different thing from the raising of an approved intrastate fare by an additional 33.3 per cent *after* the general increase of 10 per cent had already been applied; for one of the particular types of coach service on the lines of a few particular railroads in four states.

Thus, throughout the Opinion of the District Court it is clear that the District Court was unmindful of the difference between a *general revenue* case under section 15 (a) (2) and a particular intrastate fare case in a particular region on particular roads.

It is doubtful even if the federal Commission's Order in the Louisiana case—a general revenue case—would have

been sustained if the Commission had not attached a saving clause which specifically "saved the rights of interested parties to test the reasonableness of any *individual rate.*" (*Louisiana Case,* at page 79 (33)). The federal Commission gave no time or opportunity to the interested parties to test the reasonableness of the increase on October 1, 1942 of 33.3 per cent in the interstate coach fare on certain lines in certain states, over and above the general increase of 10 per cent which had been added under the general revenue case.

North Carolina asks that the Supreme Court hold that the District Court erred in upholding the federal Commission's order upon the theory that the federal Commission had the power to increase these particular fares by 33.3 per cent simply to bring about "uniformity." In supplemental Reports in Ex Parts 148 the federal Comission granted authority to depart from the ordinary basic passenger fares upon separate applications of various railroads in various parts of the country in particular cases: Does the saving clause save the railroads and offer no protection to the traveling public?

POINT IX. The evidence does not justify the exercise of federal powers over these intrastate fares.

The District Court erred in sustaining, and in itself applying, erroneous rules of law and principles which were applied by the federal Commission; and in failing and refusing to find that the federal Commission's ultimate findings are not supported by substantial evidence; and in failing and refusing to find that there is no evidence which justified the exercise of the federal authority over the intrastate coach fares. The District Court erred in failing and refusing to set aside the federal Commission's Order, and in denying the relief prayed for.

The railroads, in their case before the North Carolina Commission presented only a perfunctory sort of showing.

They offered no evidence of prejudice or discrimination, no evidence to show the relation of the proposed increased fare to the cost of the service, or even the expenses assignable to that particular kind of coach traffic, no evidence that the intrastate fare was non-compensatory or unreasonably low, and disavowing any "need of revenue" which would support a finding of unjust discrimination or burden on interstate commerce.

The North Carolina Utilities Commission relying upon the findings of the federal Commission in the *1936 Fares Case*, that the ordinary coach fare of 1.5 cents in the south was "not unreasonable or otherwise unlawful," and in the absence of any substantial evidence of the railroads, except that there had been a great increase in car-occupancy, particularly the non-reserved seat coaches, which must have affected a great reduction in the expense per coach passenger mile, withheld its approval of the increase proposed by four opulent, war-rich railroads, and granted the increase to financially weak roads. It filed a petition with the federal Commission asking that it investigate the reasonableness of the *interstate* coach fares.

The federal Commission refused to do so. It issued its Hasty Order approving the additional increase of 33.3% over and above the general increase of 10% under Ex Parte 148, and did so without any hearing, or report or findings. It gave the public no opportunity to be heard.

The federal Commission, after a hearing before it, in which there was no proof that the intrastate coach fare was non-compensatory, or unreasonably low, no specific proof to show the relation between the proposed fare and the expense per coach passenger mile, no direct evidence or prejudice against interstate travelers, and in spite of the proof that the railroads were earning more profits from passenger than from freight traffic, and were earning exorbitant rates of return on investment, issued its order requiring the railroads to increase their intrastate coach fares to 2.2 cents, as a minimum reasonable intrastate fare.

Under these circumstances the federal Commission's actions, viewed in their entirety, constituted an abuse of power.

Commissioner Splawn (and he should know) said that (258 I. C. C. 160), Par. 102:

> "In my judgment the evidence in these proceedings falls far short of establishing that the failure of respondents to receive the additional revenue, which would result from increasing the present intrastate fares to the interstate level, operates to *interfere* with or to *thwart* the broad purpose of section 15a to maintain an efficient transportation system. Nor can it be said that under present conditions the failure of the State Commissions to permit increases in the present intrastate fares constitutes an obstruction to interstate commerce . . .
>
> "I wish to emphasize my disagreement with finding 5 in this report that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues *required* to enable respondents to render adequate and efficient transportation service. There is nothing in the report or the evidence to indicate that the revenues from the present passenger fares are less than those required to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight considered as a whole.
>
> "The evidence in these proceedings does not sustain the contention that the maximum fares for interstate travel must also be the minimum fares for intrastate travel."

His separate expressions clearly point to the weaknesses in the ultimate findings of the Commission; and show that there was no occasion here for the intrusion of the federal authority into the realm of regulation which was reserved to the states by the Constitution.

Nowhere does it *clearly appear* that the exercise of the federal power over the intrastate coach fares was justified (Florida Case); or is necessary to make effective some

regulation of interstate commerce. (Illinois Case, 318 U. S. 675, 684.)

No one complained of them. There was no evidence to support the finding of prejudice between persons. (The *Barrett Case.*)

Nowhere is there any showing that the intrastate fares *interfered with or thwarted* the broad purpose of section 15 (a) (2).

The excessive rates of return and extremely low passenger operating ratios conclusively negative any finding that these roads "need revenue" and hence there is no foundation for the finding of unjust discrimination.

The authority to determine the reasonableness per se of the intrastate fares lay with the state Commissions. (The Florida Case.)

The presumption—a rebuttable one—was that the fares, held in effect by the state Commissions, were just and reasonable. (*Northern P. R. Co.* v. *North Dakota ex rel. McCue,* 236 U. S. 585.)

The federal Commission had no authority to raise an intrastate fare above a reasonable level. (*Louisiana Case.*)

The coach fare prescribed is, under existing conditions, so patently high as to be extortionate.

The federal Commission acted arbitrarily in seven separate incidents, the effect of which, in their entirety, was to deny to North Carolina the full hearing to which it was entitled under the statute.

The federal Commission exercised the federal power in such an unreasonable manner as to cause its order to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. (*Interstate Com. Com.* v. *Union P. R. Co.,* 222 U. S. 541.)

The decision of the District Court should be reversed and the Order of the federal Commission should be set aside.

STATE OF NORTH CAROLINA,
NORTH CAROLINA UTILITIES COMMISSION,
CHARLOTTE SHIPPERS' AND MANUFACTURERS' ASSO.,
NORTH CAROLINA DIVISION OF THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, and
B. F. RUSSELL.

J. C. B. EHRINGHAUS
and
F. C. HILLYER,
Attorneys.

Dated at Raleigh, N. C.,
March 10, 1945.

APPENDIX A.

Relevant Parts of Statutes Cited or Relied Upon.

SECTION 3(1).
U. S. Code, Title 49, Sec. ((1).

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SECTION 13(1).
U. S. Code, Title 49, Sec. 13(1).

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission *by petition,* which shall briefly state the facts; . . .

SECTION 13(2).
U. S. Code, Title 49, Sec. 13(2).

Said Commission *shall,* in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission. . . .

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. . . .

SECTION 13(3).
U. S. Code, Title 49, Sec. 13(3).

Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal Control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

SECTION 13(4).
U. S. Code, Title 49, Sec. 13(4).

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage,

preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15(1).
U. S. Code, Title 49, Sec. 15(1).

That whenever, after *full hearing*, upon a complaint made as provided in section 13 of this part, or after *full hearing* under an order or investigation and hearing made by the Commission on its own initiative . . .

SECTION 15(7).
U. S. Code, Title 49, Sec. 15(7), 44 Stat. L. 1447.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulations or practice and pending such hearing and decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding intiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge

for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date of this amendatory provision takes effect, *the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable*, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SECTION 15a(2).
U. S. Code, Title 49, Sec. 15a(2).

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 560.

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., *Appellees*.

On Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

FRANK W. GWATHMEY,
JOSEPH P. COOK,
CHARLES CLARK,
Attorneys for Aberdeen and Rockfish Railroad Co., et al., Appellees.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

OPINIONS BELOW.

The opinion of the specially constituted District Court of the United States for the Eastern District of North Carolina, Raleigh Division, in No. 189 Civil, *State of North Carolina* v. *United States*, appears in the Record at pages 549-574; its findings of fact and conclusions of law appear

at pages 546-547; its decree thereon entered appears at page 545; and reported 56 F. Supp. 606.

The order of the Interstate Commerce Commission which gave rise to the proceedings in the District Court appears at pages 507-508 of the record; the report of the Commission upon which said order was made appears in the record at pages 69-96; and is reported 258 I. C. C. 133, entitled, *Alabama Intrastate Fares*.[1]

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 47(a) and 345, wherein a direct appeal to this Court is authorized from a final decree of a specially constituted District Court of the United States, made pursuant to the provisions of Title 28, U. S. C., Sections 41(28), 43-48, and Title 49, U. S. C., Section 17(19), in a case brought to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission (herein called I. C. C.), other than for the payment of money.

The North Carolina rail lines (appellees here), upon whose petition the I. C. C. instituted the proceedings giving rise to the order here involved, duly intervened as parties defendant in the District Court under authority of Title 28, U. S. C., Section 45a (R. 108-109).

The final decree of the District Court was entered on the twentieth day of July, 1944 (R. 545). The petition for appeal was presented and allowed on the eighteenth day of September, 1944 (R. 583). Probable jurisdiction was noted by this Court on the thirteenth day of November, 1944 (R. 596).

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[1] The report and subsequent order of the Interstate Commerce Commission embraced four proceedings; one involving passenger fares within the State of North Carolina here immediately involved, Docket 29036, and three other similar and separate proceedings involving passenger fares within each of the States of Alabama, Docket 28963, Tennessee, Docket 29037, and Kentucky, Docket 29000. While there were four separate proceedings, the I. C. C.'s decision was embraced in one report and order.

THE STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, Part I, as amended; particularly its provisions relating to prescription of reasonable rates (Title 49, U. S. C., Section 15(1)) for the transportation of persons in the light of what is known as the "rule of rate making" (Title 49, U. S. C., Section 15a (2); 54 Stat. 912), and the "national transportation policy" (Title 49, U. S. C., notes preceding Section 1, 54 Stat. 899); and more especially involved is the application of the Federal statute (Title 49, U. S. C., Section 13(3), (4)) to remove any unreasonable preference or prejudice as between persons in intrastate and interstate commerce, or any unreasonable discrimination against interstate commerce. These sections of the Act are set out in Appendix A (bound separately) to this brief.

Section 13(4) immediately involved is quoted here:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected, thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

STATEMENT OF THE CASE.

This appeal brings up for review the decree (R. 545) of the statutory three-judge District Court wherein the order (R. 507) of the Interstate Commerce Commission was upheld. The I. C. C. ordered appellees (North Carolina rail lines) to increase their civilian[2] coach-fare rates within the State of North Carolina from 1.65 cents to 2.2 cents per mile, that is to say, from the basis or level required by the North Carolina Utilities Commission to the interstate level of such fares prescribed by the Interstate Commerce Commission for general application. The order so upheld also required the round-trip fares for civilian travel in coaches over the lines of these appellees in North Carolina to be increased from amounts, with varying limits, to the uniform basis of 1.98 cents per mile, good for three months, that is, to be the same as the interstate level. The round-trip rate of 1.98 cents per mile is less than the one-way rate of 2.2 cents per mile. It is unnecessary to discuss the lower round-trip rate.

It was following the failure and refusal of the North Carolina Utilities Commission in its order of July 8, 1943, No. 2789 (R. 128-140), to authorize the increase in passenger fares just stated that rail carriers operating in North Carolina, except the Norfolk and Western Railway Company, filed their petition with the I. C. C. (R. 121). It thereupon instituted an investigation of these intrastate fares under the provisions of Title 49, U. S. C., Section 13 (3) (4). The Norfolk and Western Railway Company was not a petitioner before the North Carolina Utilities Commission. It was not a party to the petition to the I. C. C. That was because it already had in effect coach fares of 2.2 cents per mile applicable intrastate on its two

[2] Confined to "civilian" because the lower charges paid by United States Government for troop movements and the 1.25 cent fares maintained for service men and women traveling on furlough or within thirty days after their discharge from the service are not here involved.

lines in North Carolina, one to Winston-Salem and the other to Durham, aggregating approximately 100 miles of railroad within the state. The I. C. C. instituted the investigation by its order dated October 13, 1943, wherein the rail lines, appellees here, were made respondents (R. 141). After a full hearing, it entered the order against respondent rail lines directing that their intrastate coach fares in North Carolina be raised uniformly to the level of the prevailing interstate fares (R. 507). The report and order of the I. C. C. must be read together: *Georgia Comm. v. United States*, 283 U. S. 765, 771.

Upon making a general investigation of interstate passenger fares throughout the country, the I. C. C. in *Passenger Fares and Surcharges*, 214 I. C. C. 174 (1936), found reasonable for general application a rate of 2 cents per mile in coaches in lieu of 3.6 cents, and found reasonable 3 cents per mile in sleeping and parlor cars in lieu of 3.6 cents per mile plus 50 per cent of the charge then generally in effect for sleeping or parlor car space occupied.

In *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the I. C. C. authorized the aforesaid 2-cent rate increased to 2.2 cents and 3 cents to 3.3 cents. (The latter is not here involved.) (R. 521.) This authority, with certain increases in freight rates also therein sanctioned, was granted to enable the railroads to maintain adequate transportation service during the national emergency. These increases were limited to the period of the emergency, that is, until six months after termination of the present war (248 I. C. C. 613). The 2.2-cent fares were made effective interstate February 10, 1942. The railroad regulatory bodies of forty-four states sanctioned the 2.2-cent coach fare for intrastate application in their respective states. Four states refused; North Carolina here immediately involved, and Alabama, Tennessee, and Kentucky, whose appeal from a decree of a statutory three-judge District Court of the United States for the Western District of Kentucky, Louisville Division (56 F. Supp. 478), is now before this Court in No. 574, *State of Alabama, et al., Ap-*

pellants, v. *United States, et al., Appellees*, October Term, 1944. Separate thirteenth-section proceedings were had before the I. C. C. as to each state's rates and separate hearings were held, but they were argued together before the I. C. C. and one report (258 I. C. C. 133) and order was issued to cover all four proceedings. (R. 69, 507.)

A chronological history of the background of this case is submitted herewith as Appendix B (bound separately).

SUMMARY OF ARGUMENT.

We take the broad position here that the ultimate findings and conclusions of the Interstate Commerce Commission are grounded upon basic findings of fact which are adequately supported by evidence. The ultimate findings, briefly paraphrasing and omitting references to the other three states, are:

The interstate coach fares are reasonable. The intrastate fare in North Carolina is lower than corresponding fares interstate and generally intrastate. (R. 95.)

The conditions affecting coach transportation of passengers intrastate in North Carolina and interstate to, from, and through North Carolina are substantially similar. The interstate passengers travel in the same trains and generally in the same cars with intrastate passengers, but must pay the higher fares, while the intrastate passengers pay the lower fares for like services to the unlawful preference of the intrastate passengers and prejudice of the interstate passengers. (R. 95.)

Appellee rail lines' revenues under the lower intrastate fares in North Carolina are less by $525,000 per annum than they would be at the level of the corresponding interstate fares, and passenger traffic at the lower intrastate fares is not contributing its fair proportionate share of the revenue to enable such railroads to render adequate and efficient transportation service (R. 95-96).

Maintenance of these lower intrastate fares in North Carolina causes unlawful preference of persons in intra-

state commerce and prejudice against persons in interstate commerce, and unlawful discrimination against interstate commerce, and this unlawfulness should be removed by increasing the intrastate fares in North Carolina to the level of the corresponding interstate fares[3] (R. 96).

We then stress the general principles of law applicable to thirteenth-section proceedings which are to the effect that the I. C. C. has the power and the duty to deal with intrastate charges wherever they bring about either or both of the situations declared to be unlawful, that is, preference or prejudice as between interstate and intrastate passengers, or discrimination against interstate commerce, and that, upon so finding, the I. C. C. shall prescribe the rate or fare thereafter to be charged as will remove such preference, prejudice, or discrimination. In the first instance, the question is one of the relation between intrastate and interstate rates. In the second, the question is one of relation of rates to revenue. In either instance, the I. C. C. has full authority to regulate intrastate rates, first, however, finding that the interstate level is reasonable before requiring the intrastate rates increased to their level, and upon finding no substantial dissimilarity in conditions surrounding both kinds of transportation. In exercising its authority, the I. C. C. shall give due consideration to the need in the public interest of adequate and efficient railway transportation and of preserving the same to meet the needs of commerce, the postal service, and the national defense. The purpose of Section 13 is to make certain that the accomplishment of these ends shall not be thwarted by individual action of state authorities.[4]

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[3] *Alabama Intrastate Fares* (embracing N. C.) 258 I. C. C. 133.

[4] *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563
New York v. *United States*, 257 U. S. 591,
Florida v. *United States*, 282 U. S. 194,
Georgia Comm. v *United States*, 283 U. S. 765,
Alabama v. *United States*, 283 U. S. 776,
United States v. *Louisiana*, 290 U. S. 70,
Florida v. *United States*, 292 U. S. 1,
Ohio v. *United States*, 292 U. S. 498,
Illinois Commerce Comm'n. v. *U. S.*, 292 U. S. 474

In the case at bar the appellants contend that the record did not justify the I. C. C.'s findings and that there is no evidence to support the same. As to the first, we at once point out that if there is evidence in the record to support its conclusions the order must stand, for the law as construed by this Court makes the I. C. C.'s findings of fact on substantial evidence conclusive.[5]

On all issues of reasonableness of rates, or discrimination therein, a long, unbroken line of decisions has firmly established the doctrine of the exclusive primary jurisdiction of the I. C. C. in respect thereof. Resort first must be made to the I. C. C. on such issues and when it has spoken thereon, as in this case, the only question is as to the supporting evidence.[6]

That 2.2 cents is a reasonable coach rate can not be doubted. In the case at bar the record shows, and the report of the Commission recites, that the I. C. C. reviewed the history of passenger fares from the year 1908. During that time the coach fares, under appropriate Federal regulation, were increased in 1918 from 2.5 cents to 3 cents and in 1920 from 3 cents to 3.6 cents, and were reduced in 1937 to 2 cents.[7] (R. 69, 71, 74.)

Under order of the I. C. C. of January 21, 1942, in *Ex Parte 148*, the railroads of the country were authorized to increase this 2-cent coach fare to 2.2 cents (R. 521). That was affirmed in the following report and order of March 2, 1942. Upon reexamination, that was reaffirmed in reports and orders of April 6, 1943, November 8, 1943, May 12, 1944, and December 12, 1944. In the last four orders the freight-rate increases which had been authorized were suspended;

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[5] *I. C. C. v. Jersey City*, 322 U. S. 503, 512;
Int. Com. Com. v. Union Pacific R. R., 222 U. S. 541, 547;
Florida v. United States, 292 U. S. 1, 12.

[6] *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426.
Gt. No. Ry. v. Merchants Elev. Co., 259 U. S. 285.

[7] *Alabama Intrastate Fares*, 258 I. C. C. 133, 134, 137.

the 10 per cent passenger-fare increase was purposely retained.[8]

In authorizing this passenger-fare increase, the I. C. C. contemplated similar increases on intrastate traffic in the several states.[9] And, in suspending the freight-rate increases originally authorized and affirming and reaffirming the passenger-fare increase, the I. C. C. undoubtedly recognized that the increased passenger revenues would serve as a partial offset for the loss of the much greater amount of revenue incident to the suspension of the freight-rate increases for it advisedly retained the passenger increase.[10] The distribution of the so-called "transportation burden" as between freight and passenger services is as much within the exclusive jurisdiction of the I. C. C. as is such distribution among the various commodities transported.

As railroads can hardly expect to earn even a normal return in times of general business depression, they should be given opportunity to earn more than a normal return in times of prosperity. In no other way could sound economic conditions be maintained in railroad transportation. And certainly the present times may not be taken as indicative of future trends in railroad revenues.[11]

State authorities of Rhode Island refused to sanction the increase in commutation fare and the state authorities in Texas refused to sanction the increase of fares in sleeping and chair cars from 3 cents to 3.3 cents authorized in *Ex Parte 148*. In each instance, under thirteenth section pro-

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[8] *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 255 I. C. C. 357, 256 I. C. C. 502, 258 I. C. C. 455, 259 I. C. C. 159.

[9] *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 736.
Ex Parte 148, 255 I. C. C. 357, 361.

[10] *Ex Parte 148*, 255 I. C. C. 357, 385, 394.
Ex Parte 148, 259 I. C. C. 159, 194.

[11] *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 271.
General Commodity Rate Increases, 1937, 223 I. C. C. 657, 730.
Group of Investors v. Milwaukee R. Co., 318 U. S. 523, 543.

ceedings, both states' charges were increased to the interstate level.[12] The State of North Carolina in refusing the increase in coach fares to 2.2 cents, with similar action in Alabama, Tennessee, and Kentucky, cover the sole departures from sanctioning the 2.2-cent coach fares throughout the United States interstate and intrastate.

The I. C. C. has considered and reconsidered passenger fares. Appendix C furnishes a review of the cases at a glance. That 2.2 cents per mile is a reasonable rate for coach fares is abundantly supported by the record.

The I. C. C.'s findings of preference and prejudice as between interstate and intrastate passengers are supported by substantial evidence. In this brief we have stated these findings and the supporting evidence in the text, and in Appendix D hereto. Traffic and transportation officers of appellee railroads testified at length and in detail that the passenger trains are operated without regard to state lines; none is engaged wholly in intrastate commerce; both classes of passengers are handled in the same trains and under the same conditions. Mr. Hunter, one of the Commissioners of the North Carolina Commission, testified in the thirteenth-section proceeding on behalf of his Commission and stated that both interstate and intrastate passengers are handled under the same conditions on the same trains (R. 254). Indeed, the North Carolina Commission in its order of July 8, 1943, stated (R. 140):

> "In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together . . ."

The I. C. C. made similar findings in the recent *Rhode Island case* and the *Texas case* growing out of *Ex Parte 148* and many others growing out of prior proceedings.

In such cases "typical instances" are sufficient to justify "general findings" to support a "state-wide" order.[13]

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[12] *Rhode Island Commutation Fares*, 254 I. C. C. 383, *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723.

[13] *Georgia Comm.* v. *United States*, 283 U. S. 765, 772, 774.

Witness Russell of Raleigh, N. C., offered by the North Carolina interests, in describing the coach service on his direct examination used as examples of his experience a trip that he made from Raleigh to Greensboro, N. C., (intrastate) thence to Greenville, S. C., (interstate) and returning, Greenville, S. C., to Asheville, N. C., (interstate) thence Asheville to Greensboro, N. C. (intrastate). He spoke for his business firm and on behalf of the North Carolina membership in the Travelers Protective Association. (R. 266, 267.)

Appellee railroads have suffered substantial revenue losses in North Carolina totalling over $525,000 per year by reason of the difference in the level of the intrastate and interstate fares.[14] This creates an unlawful discrimination against interstate commerce. Such loss to the affected railroads in North Carolina plus that in Alabama, Kentucky, and Tennessee amounted to $2,420,035 per year. These revenue losses grew out of a relatively small increase per passenger in the light of the fact that the average coach passenger in North Carolina travels approximately thirty miles (R. 170). Fifteen cents a head is individually small, but in the aggregate looms large with the result that the North Carolina intrastate coach traffic did not pay its proportionate share toward the maintenance of appropriate transportation service. Such service could not be rendered to travelers in North Carolina based on the wholly intrastate traffic (R. 175, 222). Both classes of passengers are handled under similar conditions. Failure of the state to sanction like increases clearly resulted in the state traffic paying a disproportionate share of the required revenue.[15]

Prosperity of the railroads is not controlling. The issue here is the contribution of the state traffic of its proportionate share. When disproportionate it is within the ex-

[14] *Alabama Intrastate Fares*, 258 I. C. C. 133, 146, 154.

[15] *United States* v. *Louisiana*, 290 U. S. 70, 75,
Florida v. *United States*, 292 U. S. 1, 12,
Illinois Commerce Comm'n. v. *U. S.*, 292 U. S. 474, 485.

clusive jurisdiction of the I. C. C. to determine whether it is a discrimination against interstate commerce.[16]

There is no merit in appellants' contention that they were denied a full hearing before the I. C. C. The state received notice, and it took an active part in the thirteenth-section proceedings at the hearing, on brief, and oral argument. Its evidence was received and considered. Its petition for reconsideration and its petition for investigation of passenger fares were both considered. In denying it further hearing and investigation, the I. C. C. was acting within the rule which this Court has recognized for administrative tribunals.[17]

In conclusion, we stress the fact that the proper findings and conclusions have been made, they are supported by the record, all proper procedural steps were taken, a proper report and order issued which the District Court correctly upheld, and, having committed no error, its decree dismissing appellants' suit should be affirmed.

ARGUMENT.

The Ultimate Findings and Conclusions of the I. C. C. Are Grounded Upon Basic Findings of Fact, Adequately Supported by Evidence.[18]

The findings of the I. C. C.

The findings contemplated by the statute, Title 49, U. S. C., Sections 13(4) and 14,[19] were adequately made by the

[16] *Wisconsin R. R. Com.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586, 588.
Florida v. *United States*, 282 U. S. 194, 212.
United States v. *Louisiana*, 290 U. S. 70, 75.

[17] *New England Divisions Case*, 261 U. S. 184, 200.
I. C. C. v. *Jersey City*, 322 U. S. 503, 516, 517.

[18] In appendix D to this brief certain primary findings of the I. C. C. are set out and reference given to supporting evidence in the Record.

[19] Hereinafter we omit "Title 49 U. S. C." and refer to the Act by section number.

I. C. C. We quote them from its report, 258 I. C. C. 154-155 (R. 95-96):

"We find that—

"1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to, from, and through points in Alabama and Tennessee, are just and reasonable.

"2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certain exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding.

"3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States, and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from, and through those respective States on the other, are substantially similar.

"4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers,

"5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama; $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair

share of the revenues required to enable respondents to render adequate and efficient transportation service.

"6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable, and unjust discrimination against interstate commerce; and this unlawfulness should be removed by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by respondents to, from and through such States; provided, that the aggregate charge made by any of the respondents for the intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent for interstate transportation to, from, or through such State."

General principles of law applicable to proceedings under Section 13(3)(4).

The general principles of law applicable to proceedings of this kind are well settled by the decisions, particularly the following:

Wisconsin R. R. Com. v. *C., B. & Q. R. R. Co.*, 257 U. S. 563,
New York v. *United States*, 257 U. S. 591,
Florida v. *United States*, 282 U. S. 194,
Georgia Comm. v. *United States*, 283 U. S. 765,
Alabama v. *United States*, 283 U. S. 776,
United States v. *Louisiana*, 290 U. S. 70,
Florida v. *United States*, 292 U. S. 1,
Ohio v. *United States*, 292 U. S. 498,
Illinois Commerce Comm'n. v. *U. S.*, 292 U. S. 474.

These decisions hold that Section 13 (3) (4) confers upon the I. C. C. the power and duty to deal with rates, fares, or charges "made or imposed by authority of any state" upon a finding that such rates, fares, or charges bring about either or both of two separate and distinct situations, both of which are declared to be unlawful:

> 1. Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand;
>
> 2. Any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

Upon a finding, after hearing, that the charges imposed by state authority cause either or both of these unlawful things, the statute declares the I. C. C.—

> "shall prescribe the rate, fare, or charge, or the maximum or minimum or maximum and minimum thereafter to be charged, * * * in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination."

In the first of the two situations declared to be unlawful the question is one of the relation between the intrastate and the interstate rates, fares, or charges. *Florida* v. *United States*, 282 U. S. 194, 214. In the second situation declared to be unlawful the question is one of the relation of the rates, fares, or charges to revenue. The I. C. C. has full authority in the premises to regulate intrastate rates. *Florida* v. *United States*, *supra*. In the case just cited, this Court stated (282 U. S. p. 211):

> "* * * The authority granted by section 13(4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.
>
> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate

share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it."

Likewise, in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585-586, it was said:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Emphasis supplied.)

It is settled also that before the I. C. C. may enter an order raising intrastate rates or fares under Section 13 (4) it must find:

> 1. That the general level of the *interstate* rates or fares (to which the intrastate rates or fares are to be raised) is itself reasonable. *Georgia Comm.* v. *United States*, 283 U. S. 765; *United States* v. *Louisiana*, 290 U. S. 70. As the Court said in the *Louisiana case*, 290 U. S., at page 79:
>
> > "* * * It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates,

raised to the reasonable general interstate level, would not themselves be reasonable; * * *."

2. That there is no substantial dissimilarity in the conditions surrounding the intrastate transportation, on the one hand, and the conditions generally surrounding interstate transportation to, from, or through the same state and surrounding territory, on the other hand.

In the Interstate Commerce Act, as amended, Congress has declared as the "national transportation policy" that the provisions of the Act shall be administered—

> "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

By Section 15a (2) of the Act the I. C. C. is directed, in the exercise of its power to prescribe just and reasonable rates, to give due consideration—

> "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

This duty to provide rates which shall insure an "adequate and efficient railway transportation service" is thus directly imposed upon the I. C. C. The very purpose of Section 13 (3) and (4) of the Act is to make it certain that the accomplishment of the desired end shall not be unduly interfered with or obstructed by the individual action of state authorities. This fact is plainly disclosed by the decisions of this Court above referred to.

To permit North Carolina to thwart the broad purposes of the I. C. C. reflected in its reports and orders in *Ex Parte 148* by requiring lower passenger fares within North

Carolina than the interstate level sanctioned by the I. C. C., would spread to other states. A similar situation arose in respect of the class rates, for freight transportation, which the I. C. C. had prescribed (R. 216) in *State Corp. Comm. of Virginia* v. *Aberdeen & Rockfish R. Co.*, 161 I. C. C. 273. The late Commissioner Eastman, speaking for the I. C. C., said at page 282:

> "* * * Reductions in intrastate rates in other southern States, several of which could justly claim a basis as favorable as North Carolina, could not fail to undo in large measure what was accomplished in the *Southern case.*"

If North Carolina can do this thing, why not Alabama, Tennessee, and Kentucky, and the others, as well? But for Section 13 and the I. C. C.'s orders made thereunder, it could not uphold its paramount authority and duty to give effect to the "national transportation policy."

The appellants contend that the Record did not justify the I. C. C.'s findings and there is no evidence to support the same.

The position of appellants may be stated to rest generally on two grounds, first, that the evidence of record did not justify the I. C. C.'s findings, and, second, that there is lack of evidence to support its findings.

In considering the first ground, we at once point out if there is substantial evidence in the record to support the conclusions of the I. C. C., and we submit there is, then its order must stand. The law makes the I. C. C.'s findings of fact on such evidence conclusive. In the recent decision in *I. C. C.* v. *Jersey City*, 322 U. S. 503, 512-513, it was said:

> "Each of the findings of fact by the Commission appears to be supported by substantial evidence. The court below has not found to the contrary, nor do we. Reasonable persons could no doubt differ as to whether

it is probable that 90 per cent of the patrons will purchase tokens, whether the revenues of the lines will increase more than the operating costs, and as to various other features of the contest.

"* * * The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needful to the discharge of its duty to the public and to the regulated railroad. 'With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive.' *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 550.

"'So long as there is warrant in the record for the judgment of the expert body it must stand . . .' 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'.' *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-46; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-87."

In *Int. Com. Com.* v. *Union Pacific R. R.*, 222 U. S. 541, 547, it was said:

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its

decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Florida* v. *United States*, 292 U. S. 1, 12, is the following:

"• • • The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by Section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra.* The purpose for which the Commisison was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 100; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663; *Assigned Car Cases*, 274 U. S. 564, 580; *Merchants*

Warehouse Co. v. *United States*, 283 U. S. 501, 508; *Crowell* v. *Benson*, 285 U. S. 22, 50, 51."

The I. C. C.'s finding that the interstate fares are reasonable is supported by evidence.

There is no merit whatever in the contention that the evidence fails to show the reasonableness of the interstate fares and charges which the railroads were directed to apply in North Carolina. In a proceeding under Section 13 of the Act the reasonableness of the interstate rates is necessarily an issue, since the I. C. C. "may not require intrastate rates to be raised above a reasonable level." *Georgia Comm.* v. *United States*, 283 U. S. 765, 770. Since *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, followed in an unbroken line of cases including *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, the doctrine of exclusive primary jurisdiction of the I. C. C. in respect of the reasonableness of rates is firmly established. Here the I. C. C. has spoken. The only question is as to supporting evidence.

In its report (R. 69) the I. C. C. gives the history of these fares and charges and the reasonableness of said fares and charges, and the results of the passenger operations of the railroads during the period 1936 down to and including the month of December, 1943, are discussed at length (R. 71-82).

In the light of the I. C. C.'s recent investigation and findings with respect to interstate passenger fares throughout the country, it would appear that the reasonableness of such fares and charges is not open to question.

In *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545 (commonly referred to as "Ex Parte 148"), the I. C. C., after an extensive investigation of freight rates and passenger fares throughout the country, entered on January 21, 1942, a preliminary order authorizing a general increase of 10 per cent in passenger fares as proposed by the carriers. In this order it was recited:

"That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employees, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges; * * *." (R. 521-522.)

It was further said:

"And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful; * *." (Emphasis supplied.) (R. 522.)

Thereafter, in the report of March 2, 1942, in the same proceeding, it was said referring to passenger fares (248 I. C. C., 564-566):

"The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, *the lowest rate per mile in railroad history.* The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 per cent less than in 1930, but the number of passenger-miles was 2.82 per cent greater, and the average mile revenue, 35.4 per cent less, than in 1930.

* * * * *

"The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. * * *

"Because of the abnormal conditions which now prevail throughout the country, we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute toward meeting the added operating costs of the railroads.

"In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares, subject to a suitable rule for the disposition of fractions stated in the order.

* * * * *

"The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed." (Emphasis supplied.)

Subsequently *Ex Parte 148* was reopened for further hearing. This was in response to petitions filed by the Office of Price Administration, state regulatory bodies, and others, wherein it had been alleged, in substance (255 I. C. C., 360):

"* * * that the financial condition of the petitioning railroads had *so improved since the original decision herein, chiefly by subsequent increase in the volume of traffic,* as to render unnecessary the continuance of the increases we authorized. Some of these protestants who filed petitions for reopening alleged that the increases were *inflationary in effect, and incompatible with the principles of economic policy adopted by Congress,* and that, if the increases should be allowed to remain in effect, the success of the Government's program to prevent inflation would be jeopardized." (Emphasis supplied.)

The report of April 6, 1943, in the reopened proceeding, shows that the Office of Price Administration was represented and participated during the hearings and at the

argument. The report further shows that, pursuant to the provisions of Section 13 (3) of the Act, a designated committee of state commissioners "sat with us throughout the hearing and argument, and has conferred with us as to the determination of the issues;" and it was further said (255 I. C. C., 361):

> "While the members of the cooperating committee have not considered the draft of this report, we have been in contact with all of them through their chairman, and are authorized to say that they concur generally in the conclusions hereinafter stated."

Upon the evidence presented at such further hearing in February, 1943, and after consideration of the latest available reports of railroad earnings, as well as forecasts made by a witness for the O. P. A. respecting anticipated earnings for the entire year 1943, the I. C. C. suspended until January 1, 1944, the increases in freight charges previously authorized and canceled the increases authorized in passenger commutation fares. The I. C. C., however, declined to modify its previous findings with respect to the increases in standard passenger fares, and stated as follows in the report (255 I. C. C., 394):

> "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight.
>
> "Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare plus the

surcharges that became effective in that year. *Interstate coach fares on the present basis of 2.2 cents per mile are 26 percent lower than the 3-cent level prevailing interstate during and before World War I.* The actual revenue collected per passenger-mile is considerably below the standard rate of fare, and is influenced by the reduced and special fares accorded, certain of which have been previously discussed, and by the application of direct-line fares over circuitous routes. The actual revenues per passenger-mile, all classes including commutation, collected in the years 1921-27, ranged from 3.086 to 2.896 cents. Excluding commutation traffic, the revenues per passenger-mile were 1.90, 1.87, and 2 cents for 1940, 1941, and 1942, respectively." (Emphasis supplied.)

In this report, dated April 6, 1943, the I. C. C. made the following specific finding (255 I. C. C., 393):

"We find that, under present conditions, and, so far as we can reasonably foresee, for the remainder of 1943, the revenues received by the railroads, if their freight rates and charges be reduced by the amounts resulting from our previous authorizations of increases in this proceeding will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof."

It must be assumed that in making the finding just quoted and in ordering the temporary suspension of the freight-rate increases, the I. C. C. contemplated that the railroads would continue to receive, as a partial offset, the increased revenue from passenger fares other than commutation fares. Distribution of the "transportation burden" is peculiarly within the administrative discretion of the I. C. C. It must be assumed also that this passenger revenue was expected to be derived from intrastate as well as interstate traffic, especially in view of the fact, as pointed out in the report, that at that time *only two* state commissions, namely, the Commissions of New Jersey and Texas, "specifically

asked for the removal or reduction of the increase on standard passenger fares" (255 I. C. C., 375).

In *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 736, it was stated:

> "The petition filed by the carriers with us on December 13, 1941, seeking increases in their rates, fares, and charges on interstate traffic, docketed as Ex Parte No. 148, was so limited because of our jurisdiction, but it reflected the proposal of the carriers to make the increases Nation-wide and indicated their purpose to petition the respective State commissions for like increases on intrastate traffic."

In his concurring opinion in *Ex Parte 148* reopened, the late Commissioner Eastman said (255 I. C. C., 403):

> "* * * * I concur in the conclusions which have been reached by the majority herein. In that concurrence, I include the conclusion that the authority to increase passenger fares, other than commutation fares, should not be revoked. The reasons for that conclusion are adequately and effectively stated in the main report."

The record here shows, and the I. C. C. finds, that as late as October 11, 1943 (only a short time prior to the hearings in the four thirteenth-section cases), the I. C. C. denied petitions filed by the Office of Price Administration and the Alabama and North Carolina Commissions seeking institution of a further investigation of interstate passenger fares in the South (258 I. C. C., 143).

In the third report in *Ex Parte 148*, dated November 8, 1943 (256 I. C. C. 502), the freight-rate increases were further suspended to June 30, 1944, but the increase in standard passenger fares was continued. The I. C. C. stated at page 505:

> "We have given further consideration to the evidence in this proceeding, including current statistical data in the way of the specified periodical reports of the petitioners which it was earlier stipulated we might

consider, and also to the returns to the show-cause order."

In the fourth report in *Ex Parte 148* of May 12, 1944, 258 I. C. C. 455, the freight-rate increases were further suspended to December 31, 1944. But the increase in standard passenger fares was again continued. The I. C. C. stated (p. 458):

"We have given further consideration to the evidence in this proceeding, including current statistical data in the way of the specified periodical reports of the petitioners as stipulated by the parties, and also to the returns to the show-cause order. *We find that although petitioners' net railway operating income and net revenue from railway operations have shown a definite downward trend in recent months*, the revenues received by the railroads from their present freight rates and charges under present conditions, and, so far as we can reasonably foresee, for the period to and including December 31, 1944, will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) of the act." (Emphasis supplied.)

In the fifth and last report in *Ex Parte 148* of December 12, 1944, 259 I. C. C. 159, the freight-rate increases were further suspended to December 31, 1945. But the increase in the standard passenger fare was again continued. The I. C. C. stated (p. 194):

"Passenger traffic for the entire period from 1930 to 1941, inclusive, failed to pay its proper share of expenses. Even with the large increase in passenger traffic in 1942, the operating ratio for passenger and allied services remained decidedly less favorable than the operating ratio for freight.

"Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare (plus Pullman surcharges) that became effective by our authorization in that year. Coach fares on the present basis

of 2.2 cents per mile are 26 per cent lower than the 3-cent level prevailing interstate during and before World War I. In fact, even after the war much higher fares were charged on local business in large sections of the country. The actual revenue collected per passenger-mile is considerably below the standard rate of fare. It is influenced by the offering of reductions in round-trip fares, by the application of direct-line fares over circuitous routes, and by special reduced fares maintained for furloughed and discharged personnel of the armed forces. The actual revenues per passenger-mile collected in the years 1921-27, including commutation traffic which is carried on fare bases below the average, ranged from 3.086 to 2.896 cents. Excluding commutation traffic, the revenues per pasenger-mile were 1.90, 1.87, 2.09, and 1.93 cents for 1940, 1941, 1942, and 1943, respectively.

"We find that no modification of our previous findings, orders, and authorizations respecting passenger fares is warranted."

We submit as Appendix C (bound separately) a chronological history of consideration of passenger fares by Federal authority.

In the light of such thorough and recent investigation and findings thus shown to have been made by the I. C. C., we can conceive of no reason to conclude that the interstate passenger fares applicable throughout the country (including the fares in North Carolina) are unreasonable.

It is not necessary to repeat here all that the I. C. C. said in its report in Docket 29036, the North Carolina case. It is sufficient to point out that heretofore the intrastate fares in North Carolina have been the same as the interstate fares (258 I. C. C., 143); that the intrastate coach fares applicable in North Carolina were subnormal fares established primarily to attract traffic that had been diverted to private automobiles (258 I. C. C., 134-135); and that a basic coach fare of 2 cents per mile was found reasonable by the I. C. C. for application throughout the United States in *Passenger Fares and Surcharges*, 214 I. C. C. 174. The

fares found reasonable in the case just cited were authorized to be increased 10 per cent in *Ex Parte 148* (248 I. C. C. 545, 565, 566), and the railroads in Alabama, Tennessee, Kentucky, and North Carolina were authorized to bring their interstate fares up to the normal level (258 I. C. C. 133, 136).

In its report, the I. C. C. stated at page 143:

> "* * * The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10-percent increase authorized in Ex Parte No. 148. *These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us.* It is a well-settled rule that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents." (Emphasis supplied.) (R. 81, 82.)

In its report, under the caption "Level of the Interstate Fares" (258 I. C. C. 137), the I. C. C. also compares the 2.2 cents interstate coach fare with fares in effect during previous years and as far back as April 1, 1908; finds that "economic conditions have greatly changed" since the decision in *Passenger Fares and Surcharges, supra*, in 1936; shows that the principal railroads in North Carolina sustained heavy operating deficits over a long period of years prior to the war (pp. 138-140); and takes note of the increases in revenue, both freight and passenger, growing immediately out of the increased volume of traffic attributable to war conditions (p. 140); as well as "the added burdens on the passenger departments and facilities" of the railroads under war-time operations (p. 141).

At page 140 of the report, it is stated:

> "The statistics in the regular monthly reports as made to us by the class I railroads were made a part of the record by stipulation at the oral argument. The latest of such reports now on file with and available to us are for the month of December 1943. Compared with the same month in 1942, that month resulted in an increase of 0.2 percent in freight revenue and 32.8 percent in passenger revenue for the southern region and 7.4 and 27.2 percent, respectively, for the country; but in a reduction in net railway operating income from all rail operations of 61.4 percent for the southern region and 55.9 percent for the country. For the year 1943, the increase over 1942 was 13.3 percent in freight revenue and 67.9 per cent in passenger revenue for the southern region and 14.1 and 60.8 percent, respectively, for the country, but the net railway operating income fell below that for 1942 by 9 and 8.3 percent, respectively. The monthly increases over the corresponding months of the preceding year in the passenger revenues of the railroads of the country, including those in the southern region, have been quite steadily declining. Thus in July 1943, that increase was 74.4 percent for the southern region and 70.4 percent for the country, and in December of that year it was 32.8 and 27.2 percent, respectively. Also, the net railway operating income has steadily declined from a deficit compared with that for the same month of the preceding year of 12.1 per cent for the southern region and 9.7 percent for the country in July, to 61.4 and 55.9 percent, respectively, for December; *so that, due to increased expenses and taxes, the net railway operating income of the railroads in the southern region dropped from $28,578,717 in December 1942 to $11,035,492 in December 1943.*" (Emphasis supplied.) (R. 78, 79.)

Each and all of the findings of the I. C. C. with respect to the reasonableness of the interstate fares are supported by evidence of record. Testifying in the thirteenth-section proceeding, Witness Tassin submitted statistical data with respect to the thirteen railroads operating in North Carolina (R. 315-382). Passenger traffic officers of the rail-

roads showed the history of the fares, both state and interstate; large expenditures that have been made for improvement of passenger equipment and service; and numerous increases in operating expense attributable directly to wartime operations (R. 151, 166, 180, 184, 235).

The truth of the principle that over a period of years the railroads must have adequate revenues has always been recognized by the I. C. C. In *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 271, it was said:

> "Then, too, a railroad must be allowed to accumulate a surplus in good years which will offset bad years, and if its financial position is to be a reasonably strong one that surplus must be large enough to remove doubt from the mind of the investing public. We think that a railroad in ordinary years should be permitted to show a substantial surplus over and above the payment of a reasonable dividend. This is necessary to provide for interest on capital invested in improvements which will not yield an immediate return, to take care of the element of obsolescence, and to tide over years of depression."

And in *General Commodity Rate Increases, 1937*, 223 I. C. C. 657, 730, it was said:

> "However, recognition of this fact that the railroads cannot hope in times of economic depression to earn a normal return carries with it recognition of the complementary principle that they should be given an opportunity to earn more than a normal return in times of prosperity."

It is clear, we think, that in order to promote sound economic conditions in transportation and to develop and preserve a national transportation system adequate to the needs of the country, the I. C. C. is not only required to consider the current earnings of the carriers but must also consider their past earnings and probable future financial requirements. It is well known that the carriers have not been able during the present emergency period to maintain their properties and equipment at the usual standard; that

the wear and tear on their properties and equipment have been unusually great; that they have been unable to obtain much needed equipment; and that these facts have resulted in their rates of return being overstated. See *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 731-732. It is also well known that after the war the carriers must inaugurate extensive rehabilitation and improvement programs, and must obtain much new and modern equipment. Nevertheless, the I. C. C. found, as we have shown, that due to increased expenses and taxes the net railway operating income of the railroads in the Southern region has decreased materially in recent months, having dropped from $28,578,717 in December, 1942, to $11,035,942 in December, 1943.

Very recently this Court pointed out the unreliability of "war earnings" as a guide for the future. It was said in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 543:

> "As some of the bondholders point out, the bulge of war earnings *per se* is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year."

The I. C. C. gave consideration to the intrastate fare of 1.5 cents increased to 1.65 cents. On pages 135-136 of the report, 258 I. C. C., the I. C. C. states:

> "On December 1, 1933, most of the lines in southern territory established experimental fares of 3 cents per mile in sleeping and parlor cars, without a surcharge, and 1.5 cents per mile in coaches, which remained in effect through November 14, 1937. However, a number of railroads kept their one-way coach fares at 2 cents per mile during this period, but met the 1.5-cent fares maintained by other roads where competition made that necessary. Among the lines which retained the 2-cent coach fare during this period were the Illinois Central Railroad Company, Mobile & Ohio, and

the St. Louis-San Francisco Railway Company (J. M. Kurn and Frank A. Thompson, trustees).

"In *Passenger Fares and Surcharges*, 214 I. C. C. 174, decided February 28, 1936, we reviewed railroad passenger fares throughout the nation, and found the basic fares to be unreasonable. We prescribed maximum reasonable fares of 2 cents per mile, one way and round trip, in coaches, and 3 cents per mile, one way and round trip, in standard pullman cars, without prejudice to the maintenance of lower fares in coaches or pullman cars. The pullman surcharge was found unreasonable and its cancellation was required. The existing experimental fares in southern territory were found not unreasonable or otherwise unlawful. (R. 72.)

. . . . . .

"On July 14, 1942, the railroads operating in southern territory filed with us a petition for authority to increase their lower fares for interstate one-way transportation in coaches in that territory to 2.2 cents a mile, the basis of the coach fares then in effect generally throughout the remainder of the United States. *Having found in Passenger Fares and Surcharges, supra, that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines of petitioners,* we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding. Pursuant to that authority, one-way coach fares of 2.2 cents a mile were published to become effective October 1, 1942, on interstate traffic." (Emphasis supplied.) (R. 73.)

It is clear that the I. C. C. did not approve the 1.65-cent fare as a maximum reasonable one. It was the outgrowth of the experimental fare of 1.5 cents which certain of the Southern carriers published for interstate and intrastate application throughout Southern territory in an attempt to attract additional travel to the railroads in competition with other forms of transportation, particularly with the private automobile and busses. (Exhibit 1, R. 296.)

We submit that the finding of the I. C. C. as to the reasonableness of the interstate fares is fully supported by the record.

The I. C. C.'s findings of preference and prejudice as between interstate and intrastate passengers are supported by evidence.

In its report (258 I. C. C. 133), the I. C. C. makes the following findings, among others:

> "Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers" (p. 145, R. 85).
>
> "Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances." (Typical examples of such differences are then given) (pp. 145-146, R. 85).
>
> "So also, illustrations are of record showing differences between the fares over interstate and intrastate routes between points in the same State" (p. 146, R. 85).
>
> "All trains operated by respondents in each of the States are available to and are used by both interstate and intrastate passengers, and the services accorded to both classes of passengers are substantially the same" (p. 146, R. 86).
>
> "The illustrations above given are typical of a condition which exists in some degree between interstate and intrastate passengers on every mile of track operated in passenger service by each of the respondents in all four of these States, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (p. 146, R. 86).
>
> "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four states" (p. 153, R. 94).
>
> "The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin*

R. Comm. v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide, and is similar in every respect to that before us in *Rhode Island Commutation Fares*, 253 I. C. C. 383, and in *Increases in Texas Rates, Fares, and Charges, supra*" (p. 153, R. 94).

Each and all of these findings by the I. C. C. are supported by evidence of record. That interstate and intrastate passengers use the same trains and that all trains are available to interstate and intrastate passengers alike is shown by the testimony of railroad witnesses.

Witness Blackwell testified that in the operation of trains into, out of, and across North Carolina no distinction is made with respect to interstate and intrastate passengers. Both travel in the same coaches. In the physical operation of trains in North Carolina none is operated solely for intrastate travel. (R. 154, 155.)

Witness Barry testified that no distinction is made in the handling of interstate and intrastate passengers into and out of the State of North Carolina or within the State of North Carolina (R. 301).

Witness Makinson testified along similar lines, and added there is no difference in the equipment of through trains (R. 236).

Commissioner Hunter, a witness on behalf of the North Carolina Utilities Commission, testified that both interstate and intrastate passengers are handled under the same conditions on the same trains (R. 254).

In the report and order of July 8, 1943, in which the North Carolina Utilities Commission refused to grant the petitioning railroads authority to increase the 1.65-cent rate to 2.2 cents, the Commission stated:

"'In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together, . . .'" (R. 140.)

There are nine through passenger trains operated by Southern Railway north of Charlotte in each direction, or eighteen in all (Witness Barry R. 174).

Witness Barry further testified that the "Streamliners" on Southern Railway make six stops in the State of North Carolina, and that they pick up passengers in that state and carry them to another point in North Carolina (R. 176, 177). He further stated that streamliners are generally known as coach trains on which there are reserved seats, and when they are sold to capacity no more tickets are sold (R. 289).

The finding of the I. C. C. that interstate passengers in the State of North Carolina travel in the same trains and generally in the same cars with intrastate passengers, for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and undue and unreasonable disadvantage and prejudice of the interstate passenger is warranted by the evidence of record. At page 145 of its report, 258 I. C. C., the Commission finds that—

> "Respondents in each of these States are engaged in the handling of both intrastate and interstate passengers. Such passengers are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances." (R. 85.)

The record shows that passengers are actually traveling from a point without the State of North Carolina to a point within the state, and are also traveling from a point within the state to another point within the state (R. 312).

Examples filed by Witness Barry show the higher fares paid by interstate passengers than those paid by intrastate passengers for approximately the same distance (R. 310).

Testimony of similar import was given by Witness Lynch (Exhibit 7, R. 314) and by Witness Makinson (Exhibit 13, R. 383).

Witness Makinson testified as follows:

"On Seaboard Railway train No. 18, of November 16, 1943, there were two passengers on the train, and I have the tickets that each one of them surrendered. One is an intrastate ticket from Norlina to Littleton, North Carolina. The other is an interstate ticket from Norlina to Portsmouth, Virginia. One man paid 1.65 a mile and the other paid 2.2 cents a mile. (R. 239.)

* * * * * * * * * * *

"The Witness: Same train, starting in North Carolina, ending up in Virginia.

"Here is another, two more tickets, train No. 9, starting on November 17th, ending November 18, 1943, two passengers on that train. One had a ticket from Raleigh to Hamlet, which was intrastate. He paid 1.65 cents a mile for his ticket. Another passenger in the same coach had a ticket from Raleigh to Athens, Georgia, for which he paid $8.47, which was the rate 2.2 cents a mile plus the tax." (R. 239, 240.)

Witness Haynes testified that his investigation developed that business concerns located outside of the State of North Carolina ship their products into that state in competition with those located within the state. Salesmen and sale supervisors for these interstate concerns travel by train into North Carolina and pay the interstate fares. (R. 191, 192.)

This witness further testified that among the manufacturing concerns which do business in North Carolina in competition with similar businesses within that state are fertilizer, scrap dealers, glass and paints, flour and feed mills, creosoting plants, tobacco, pulpwood, paper container companies, shoe manufacturers, log and lumber, foundry and machine, cotton mill supplies, electric supplies, fire extinguisher, plumbing fixtures, belting, and brick and tile (R. 191-195, 199-200).

Mr. B. F. Russell, of the E. F. Craven Co., Greensboro, N. C., a concern which deals in heavy-construction equipment, testified (R. 266) in behalf of that concern and also as a representative of more than 3,600 members of

the North Carolina Division of the Travelers Protective Association. He said his company has salesmen traveling within the state, and they are traveling more by train now than ever before. When asked would the increase sought mean anything to his company, he said (R. 267): "It would, yes, sir. It would cost us more money for the traveling of the men." That shows the intrastate passenger is presently preferred.

The I. C. C., on pages 146-147 of its report, (R. 85, 86) gives illustrations of the differences in fares paid by interstate and intrastate passengers traveling approximately the same distances. The I. C. C. also gives illustrations to show the differences in the one-way fares over intrastate and interstate routes between points in the same states, and points out that similar situations are shown with respect to round-trip fares. These illustrations have basis in the record.

It is difficult to see how evidence could more clearly show the preference to intrastate passengers and intrastate routes than those mentioned by the I. C. C., and the other ilustrations in the record. Appellants, however, contend that the evidence is insufficient in that no passenger, or prospective passenger, complained of the differences in fares, and no actual damage to interstate passengers was shown specifically. They forget their own witness Russell.

It seems to us that the damage to the interstate passengers and the interstate routes is obvious. It would have been a waste of time and effort to have interstate passengers or prospective passengers at the hearings to testify to the obvious. The following language of the I. C. C. from its report in *Rhode Island Commutation Fares*, 253 I. C. C. 383, 389, is to the point:

> "The foregoing illustrations are typical of others where, for the same or even shorter distances, interstate commuters now pay more than intrastate commuters traveling on the same kind of ticket subject to like restrictions. In other words, the interstate and

intrastate commuters ride on the same train, yet for identically the same service the interstate passenger is required to pay a higher rate of fare than the intrastate passenger. A little deductive reasoning is all that is required to spell out of those facts the undue prejudice and disadvantage and the undue preference and advantage forbidden by section 13 (4) of the act.

"No one contends that the economic condition of the average intrastate commuter is any different from that of the interstate commuter. Plain justice demands, therefore, that the 10-percent increase be paid by both or by neither. In view of our findings in Ex Parte No. 148 in respect of the need for an increase in the interstate fares, and in the light of this record, it is clear that the only reasonable and lawful course to pursue is to require a like increase in these intrastate fares."

Similar findings were made in *Increases in Texas Rates, Fares, and Charges,* 253 I. C. C. 723. Both the *Rhode Island case* and the *Texas case,* like the instant proceedings, grew out of the denial by state authorities of certain *Ex Parte 148* increases; and in both the I. C. C. ordered removal of the undue preference, prejudice, and discrimination thereby created.

Here we have a case in which the intrastate fares in North Carolina were lower than the corresponding interstate fares into and through that as well as other Southern states, some of which are immediately adjacent to it. The fact that this difference is material and without justification, that it affects a large number of interstate passengers, and that the prejudice to such passengers is obvious; makes out a case under Section 13(4) of the Act of preference and prejudice as between persons in intrastate and interstate commerce. It needs no argument to show that to charge two passengers, who may be riding in the same train and, perhaps, in the same seat, different fares for the same service amounts to unjust discrimination.

It can not be doubted that the power of the I. C. C. under Section 13(4) is broader than it is under Section 3(1). It

is to be noted that throughout Section 3(1) the word "particular" appears. It is made unlawful for any common carrier to make, give, or cause any undue or unreasonable preference or advantage to "any *particular* person, company ,etc." In Section 13(4), on the other hand, the word "particular" does not appear. The prohibition there is against *any* undue or unreasonable advantage, preference or prejudice "as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

The broader scope of Section 13(4) is also indicated by the fact that its purpose is to foster and protect interstate commerce and the national transportation system, whereas the purpose of Section 3(1) is to prevent undue preference and prejudice as between individual shippers or passengers. To hold that Section 3(1) and that portion of Section 13(4) which deals with preference and prejudice as between persons and localities mean precisely the same thing would be equivalent to saying that Congress had indulged in needless repetition and that the differences in the language used mean nothing.

But whether or not the power of the I. C. C. under Section 13 is broader than it is under Section 3, the evidence in the instant case is sufficient to justify a state-wide order under Section 13(4). The I. C. C. has found, and it is a fact, that interstate and intrastate passengers are carried on the same trains and generally in the same cars; that all trains operated by appellees in each of the states are available to, and are used by, both interstate and intrastate passengers; that the services accorded to both classes of passengers are substantially the same; and that prejudice against the interstate passenger and preference in favor of the intrastate passenger exists "*on every mile of track operated in passenger service by each of the respondents in all four of these states*, excepting only those portions of respondents' lines on which the intrastate and the interstate bases are now the same" (258 I. C. C. 133, 146). A differ-

ence in fares under these circumstances is manifestly preferential and prejudicial. And the damage to the interstate passengers resulting therefrom is made plainer by the fact that the volume of interstate and intrastate passenger traffic over appellees' lines is large and the difference in the charges paid by the two classes of passengers is great.

The views taken by appellants of the "prejudice or preference as between persons" provision of Section 13(4) are too narrow. The opinion in *Georgia Comm.* v. *United States*, 283 U. S. 765, leaves no doubt as to the power of the I. C. C. to make a state-wide order under this part of Section 13(4) upon a finding of "typical instances" which are sufficient to justify "general findings." In that case the Court was dealing primarily and particularly throughout the opinion with the so-called "persons-locality" provision of Section 13(4) and upheld an order of the I. C. C. under that provision which was state-wide in its scope. The Court said (p. 774):

> "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579. Compare Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 83. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. *To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief.*" (Emphasis supplied.)

And further said (p. 772):

> "The order here challenged is statewide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully

drawn order, otherwise valid and practicable of operation over a wide territory."

The facts in the instant case are even stronger than they were in the *Georgia Public Service Commission case* because, as the I. C. C. has found, the conditions surrounding the transportation of interstate and intrastate passengers are not in any instances "divergent," but are substantially the same.

The District Court well stated it (56 F. Supp. 606, 618):

> "* * * The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. It is nothing short of nonsense to say that under such circumstances an intrastate fare of 1.65 as against an interstate fare of 2.2 does not constitute an undue discrimination in favor of intrastate passengers and against interstate passengers. When such discrimination is shown on a state-wide scale a general finding of discrimination is sufficient, and there is no need of a finding of discrimination against particular persons or with respect to particular fares."

The I. C. C.'s finding of unlawful discrimination against interstate commerce is supported by evidence.

In its report, the I. C. C. makes the following finding (258 I. C. C. 133, 154):

> "5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service." (R. 95, 96.)

The above finding of the I. C. C. is supported by evidence of record.

Statement 1 of Exhibit 9 (R. 317) filed by Witness Tassin shows the gross revenue loss of the North Carolina railroads, individually and collectively, by reason of the refusal of the North Carolina Utilities Commission to permit the fare of 1.65 cents per mile to be increased to 2.2 cents per mile. Had the increase sought in intrastate passenger fares between points in North Carolina been in effect between December 1, 1942, and September 30, 1943, $465,578, additional revenue would have been earned by the thirteen railroads parties to the petition filed with the Interstate Commerce Commission. On basis of a year, that would have amounted to $558,694. This statement further shows that for the twelve months ended February 28, 1943, the amount would have been $432,150, and for the twelve months ended September 30, 1943, $566,823.

At page 154 of its report, the I. C. C. says:

> "The revenue lost to respondents in each of these States by reason of the lower intrastate fares is substantial, and the transportation conditions under which the intrastate service is performed do not differ materially from those under which the interstate service is performed. Section 13 (4) of the act empowers us to increase intrastate rates or fares so that the intrastate traffic may produce its fair share of the earnings required by the respondent carriers to enable them to provide adequate and efficient railway transportation service, both interstate and intrastate. *United States* v. *Louisiana*, *supra*, page 75; *Florida* v. *United States*, 292 U. S. 1; *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474. 'The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried • • • under substantially the same conditions.' *Illinois Commerce Comm.* v. *United States*, *supra*, page 485." (R. 94-95.)

The I. C. C. in its order of January 21, 1942, in *Ex Parte 148*, found that the increase in passenger fares therein

approved was necessary to meet, in part, increased operating expenses and to enable the carriers "to continue to render adequate and efficient railway transportation service during the present emergency," and it specifically found that these fares would be reasonable and lawful (R. 522).

As stated in the *Wisconsin case*, 257 U. S. 563, 585-586:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. * * * The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

Statement 1 of Exhibit 9 (R. 317) shows that the intrastate passenger traffic in North Carolina failed to pay its "fair proportionate share" of the cost of maintaining an adequate system of railroad by more than $500,000 per annum. Certainly, it can not be questioned that the low intrastate fares responsible for this result caused undue, unreasonable, and unjust discrimination against interstate commerce. Incidentally, for the four states of North Carolina, Alabama, Kentucky, and Tennessee the annual loss amounted to $2,420,035 (Exhibit 10, page 2, R. 343).

The law does not contemplate that the interstate passenger should contribute more than his proportionate share of the cost of maintaining an adequate railway system simply because the railroad is prosperous. The intrastate passenger as well as the interstate must contribute his "proportionate share" at all times; in times of depression as well as in times of prosperity. The service being the same, it follows their share of contribution must be the same. The I. C. C. aptly said in *Rhode Island Commutation Fares*, 253 I. C. C. 383, 389:

> "No one contends that the economic condition of the average intrastate commuter is any different from that of the interstate commuter. Plain justice de-

mands, therefore, that the 10-percent increase be paid by both or by neither."

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, it was said:

"* * * Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Emphasis supplied.)

In *Florida* v. *United States*, 282 U. S. 194, 211, it was said:

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic *should pay 'a fair proportionate share' of the cost of maintenance.* And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates, as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it." (Emphasis supplied.)

Again, in *United States* v. *Louisiana*, 290 U. S. 70, 75, it was said:

"* * * So construed, section 13(4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property

devoted to the transportation service, both interstate and intrastate."

The record here shows, and the I. C. C. found, that the intrastate coach traffic in North Carolina was failing to contribute its fair proportionate share of the revenue needed for the maintenance of an adequate transportation system —in North Carolina by at least $525,000 per annum.

We repeat, the record shows unequivocally that the intrastate passenger in North Carolina receives the same service as the interstate passenger, and, further, that the transportation conditions are the same in North Carolina as in other Southern states. It follows, therefore, that the intrastate passenger should pay the same fare. He should share the expense of operating the railroads on an equal basis with the interstate passenger. Justice demands this regardless of whether the railroads are in the throes of depression or are very prosperous. The failure of the intrastate traffic to make its fair contribution towards the maintenance of an adequate railway system, we submit, is decisive of the issue of unjust discrimination against interstate commerce by reason of the maintenance of lower intrastate fares.

The appellants charge that the I. C. C. acted arbitrarily in that it made no specific finding that an intrastate fare of 1.65 cents per mile is noncompensatory or fails to yield more than the actual cost of transporting an individual passenger. We submit the I. C. C. was not required to make any such finding. Its powers and duties under Section 13(3)(4) relate solely to the matter of *discrimination, preference, or prejudice and the removal thereof.* True, it must find that the level of the *interstate* fares is reasonable before it may order a raise of the intrastate fares to such level. *Georgia Comm.* v. *United States, supra.* But an intrastate fare may be above the actual cost of the service but still be unduly low and unreasonable in its relation to the comparable reasonable interstate fare.

Here we have a situation in which the I. C. C., after a nation-wide investigation in *Ex Parte 148*, has found and declared that the present general level of interstate fares on the basis of 2.2 cents per mile is just and reasonable. It has further found and declared that the revenues derivable therefrom *are needed* for the maintenance of an adequate transportation system under the existing unprecedented emergency conditions growing out of the war. It has also found that the conditions surrounding intrastate transportation in North Carolina are in no substantial respect different from those surrounding interstate transportation. It was not required to make any specific finding that the intrastate fares either are or are not "compensatory."

Trains of the railroads operating in North Carolina operate also in other states. Intrastate as well as interstate passengers travel on such trains. It is obvious that not one of these roads could by any possibility maintain its present train service in and through North Carolina were it solely dependent for its revenue upon intrastate traffic in such state alone. If such traffic fails to contribute its proportionate share of operating expenses, the burden of making up the difference must fall upon the interstate transportation.

As was said in the *Wisconsin case, supra* (p. 588):

> "* * * Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them."

And as the I. C. C. pointed out in *Rhode Island Commutation Fares, supra*, "plain justice" demands that the *Ex Parte 148* passenger-fare increase be paid by both interstate and intrastate passengers *or by neither*.

The decisions above referred to show also that the question whether the railroads are in need of additional revenue is of no legal significance in any litigation involving Section 13(3) (4). Neither the history of that section nor its inter-

pretation by this Court supports such a theory. Such theory would defeat the very purpose for which Congress framed the plan for maintaining a national transportation system. That Section 13 would be nullified under such a contention is evident. We do not think anyone would seriously contend that the railroads would have to show, in a proceeding under Section 13, that they were in a state of bankruptcy before they could obtain relief, or show that without the additional intrastate revenue they could not perform their public duty. If this test is to govern it would defeat any Section 13 case. This is so, because even in the lowest period of the depression, 1932, the railroads (including appellees here) continued to perform their public duty. Moreover, if this test is to govern it would lead to the absurd conclusion that in times of prosperity the states could require intrastate passengers to be carried for nothing—or at least for a charge barely above the limit of actual confiscation.

The facts which would justify a finding that the low intrastate fares are unlawful as a discrimination against interstate commerce are the same whether the railroads are prosperous or insolvent. And if the facts are such as to show that the intrastate business is not contributing "its fair proportionate share" of the cost of maintaining an adequate railway system, then, we submit, the unlawful discrimination is proved. The financial status of the railroads does not control. The intrastate passenger as well as the interstate must contribute his "fair proportionate share" at all times—in times of depression as well as in times of prosperity.

The I. C. C. has the power to raise intrastate fares to remove an unjust discrimination against interstate commerce. The determination of the issue of discrimination is within the exclusive jurisdiction of the I. C. C. The order entered by it, and under attack in this proceeding, based as it is on substantial evidence of record, must be sustained as a valid one. The record establishes a clear case of undue and unlawful discrimination against interstate commerce.

The Order of the I. C. C. Was Made After Full Hearing.

Appellants' contention that the I. C. C. denied them the full hearing to which they were entitled is without merit.

A complete answer to this contention is found in the report of the I. C. C., 258 I. C. C. 133. As therein shown, after institution of the investigation under Section 13 of the Act, and after due notice to the state authorities as provided in that section, hearings were held, briefs were filed, and oral argument had before the entire I. C. C. (R. 70, 71).

The transcript in this Court of evidence before the I. C. C. covers 152 pages of testimony and 20 exhibits in 114 pages—a total of 266 printed pages. Representatives of the North Carolina Utilities Commission testified at the hearing before the I. C. C. Examiner. Its attorneys filed a voluminous brief and participated in the oral argument.

The report of the I. C. C., dated March 25, 1944, was released and served on March 30, 1944. No order was entered at that time, it being stated in the report (258 I. C. C. 133, 155):

> "In accordance with our practice in such proceedings, we shall leave to respondents and the respective State commissions the matter of adjusting the intrastate fares to conform to these findings. If this is not accomplished within 30 days from the service of this report, consideration will be given to the entry of an appropriate order." (R. 96.)

On April 26, 1944, the North Carolina Utilities Commission filed a petition with the I. C. C. for an extension of the thirty-day period and for reopening, reargument, and reconsideration by the I. C. C. of its report of March 25, 1944 (R. 449-488). The railroads replied (R. 490-505). The petition was denied by the I. C. C. on May 8, 1944 (R. 508).

On May 8, 1944, the I. C. C. issued the order here complained of (R. 507).

In the *New England Divisions Case*, 261 U. S. 184, 200, it was said:

> "* * * A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized and observed, these essentials of a full hearing."

It will thus be seen that there can be no ground of support for any claim that a "full hearing," as provided in Section 13 of the Act, was not had.

Neither can it be contended successfully that the I. C. C. acted arbitrarily in that, on October 11, 1943, it denied petitions of the O. P. A. and the North Carolina and Alabama Commissions for the institution of a further investigation of interstate passenger fares in the South.

The I. C. C. says in its report (258 I. C. C. at 143):

> "In July, 1943, the North Carolina Utilities Commission filed with us a petition for a general investigation on our own motion of the lawfulness of the interstate coach fares to, from, and through North Carolina. That petition, together with petitions dated July 31, 1943, of the Price Administrator and August 27, 1943, of the Alabama Public Service Commission for a general investigation of the reasonableness, under present conditions, of the interstate coach fares of all of the railroads in southern territory, was denied by our order of October 11, 1943. The present interstate fares, one-way and round-trip, are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra*, plus the 10 percent increase authorized in Ex Parte No. 148. These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States, and the round-trip fares are now in effect on interstate and intrastate traffic throughout all of southern territory, except intrastate in the several States the fares in which are here before us. It is a well-settled rule

that the most helpful evidence in determining the reasonableness of rates or fares is comparison with other rates or fares for like services. The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents."

The reasonableness of the coach fares applying interstate throughout the whole country and intrastate in 44 of the 48 states was considered by the I. C. C. in the report here under attack and reviewed therein under the caption "Level of the Interstate Rates," at pages 137 to 143.

The refusal of the I. C. C. to further investigate was a matter well within its discretion, and does not constitute an abuse of discretion which would invalidate its order. In the recent decision in *I. C. C.* v. *Jersey City*, 322 U. S. 503, it was said at 517:

"The rule that petitions for rehearings before administrative bodies are addressed to their own discretion is uniformly accepted and seems to be almost universally applied in other federal courts. *United States ex rel. Maine Potato Growers & Shippers Assn.* v. *Interstate Commerce Commission*, 88 F. 2d. 780, 784, cert. denied, 300 U. S. 684; *Mississippi Valley Barge Line Co.* v. *United States*, 4 F. Supp. 745, 748; *Union Stock Yards Co.* v. *United States*, 9 F. Supp. 864, 873; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 972; *R. C. A. Communications* v. *United States*, 43 F. Supp. 851, 858."

Another significant statement was made in the same opinion at page 516:

"This Court has held that the Interstate Commerce Commission did not abuse its discretion in refusing a request for a new study as a basis for rate-making, although changes were alleged consisting of a falling off in volume of traffic, improvement of highways in the district resulting in diversion of traffic from rail to truck, decline in value of the articles transported, reduction in wages and cost of supplies, and curtailment of the amount of service rendered, and where

> the Commission decided that it was able on the record before it to consider the effect of the factors suggested by the appellants and that a new cost study was unnecessary. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 480. Except that the trends are in an opposite direction, the inquiry demanded here is of the same nature. See also *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 769-70."

The denial by the I. C. C. of the North Carolina Commission's petition of April 26, 1944, for reopening, reargument, and reconsideration, being a matter within the discretion of the I. C. C., it follows that it did not err as a matter of law in denying the state's petition.

CONCLUSION.

We submit that the Interstate Commerce Commission in the North Carolina case, Docket 29036 (258 I. C. C. 133), has made the essential basic findings to support the ultimate conclusions it reached and upon which the order herein attacked was entered. Those findings and the ultimate conclusions and the order thereon are supported in the record by substantial evidence. All proper and appropriate procedural steps were taken, including notice, hearing, receipt of material evidence, briefs, and oral argument, on behalf of the interested parties, consideration of the record so made, and the report and order issued in due season, all in keeping with the provisions of the applicable statutes. The District Court correctly so held and committed no error in refusing the injunction and dismissing

the suit of the North Carolina interests, appellants here. The decree of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I certify that I am of Counsel for the railroads who are appellees in Nos. 560, 561, 574, and 592, and have this day served the foregoing brief, and the appendices thereto, by depositing copies of the same in the United States mail, properly stamped with first-class postage and properly addressed to the following:

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This day of April, 1945.

CHARLES CLARK.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 560.

STATE OF NORTH CAROLINA, NORTH CAROLINA UTILITIES COMMISSION, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

APPENDICES A, B, C, AND D TO BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

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APPENDIX A.

CERTAIN SECTIONS OF THE INTERSTATE COMMERCE ACT, PART I.

U. S. Code, Title 49, Section 13(3):

Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare,

charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearing with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

U. S. Code, Title 49, Section 13(4):

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and prac-

tices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

U. S. Code, Title 49, Section 15(1):

That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

U. S. Code, Title 49, Section 15a(2):

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

U. S. Code, Title 49, notes preceding Section 1:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPENDIX B.

CHRONOLOGICAL HISTORY OF THE CASE.

(Barry, Exhibit 1, R. 295-300.)

February 28, 1936, Docket 26550, *Passenger Fares and Surcharges*, 214 I. C. C. 174, I. C. C. condemned 3.6 cents per mile in coaches and sleepers and chair cars and struck 50 per cent surcharge on sleeping and chair-car accommodations which had inured to the railroads. I. C. C. prescribed as reasonable throughout the United States for interstate application 2 cents in coaches and 3 cents in sleepers and chair cars.

November 15, 1937, the 2-cent and 3-cent rates of fare became effective interstate and intrastate including North Carolina, Alabama, Kentucky, and Tennessee.

December 1, 1933, to November 14, 1937, some Southern lines experimented with fares slightly less than those prescribed interstate in Docket 26550. They finally got down to 1.5 cents in coaches, although such roads as Norfolk & Western, Chesapeake & Ohio, Illinois Central, St. Louis-San Francisco, Gulf, Mobile & Ohio, and some short lines, did not reduce their rates, except only to the extent of meeting competition of the 1.5-cent fares in a limited number of instances.

January 15, 1939, those Southern railroads which had had the 1.5-cent coach fares went back to them.

January 21, 1942, I. C. C. in *Ex Parte 148* sanctioned 10 per cent increase whereby 2 cents became 2.2 cents and 3 cents became 3.3 cents. It has affirmed that in five reports:

March 2, 1942, 248 I. C. C. 545.
April 6, 1943, 255 I. C. C. 357.
November 8, 1943, 256 I. C. C. 502.

May 12, 1944, 258 I. C. C. 455.
December 12, 1944, 259 I. C. C. 159.

February 10, 1942, these 10 per cent increases became effective interstate and intrastate with certain exceptions. That raised 1.5 cents to 1.65 cents and 2 cents to 2.2 cents. Texas refused to increase 3 cents to 3.3 cents and Rhode Island refused increase in its commutation fares. These charges in both instances were brought up to the interstate levels by thirteenth-section proceedings: 253 I. C. C. 723 and 253 I. C. C. 383, respectively.

July 14, 1942, Southern lines petitioned I. C. C. to modify its order in its Docket 26550 to increase 1.65 cents to 2.2 cents.

August 1, 1942, I. C. C. granted that petition.

October 1, 1942, the increase from 1.65 cents to 2.2 cents became effective on the lines of these several Southern territory lines, interstate and intrastate, except intrastate in North Carolina, Alabama, Tennessee, and Kentucky.

October 12, 1942, railroads petitioned North Carolina Commission to increase 1.65 cents to 2.2 cents.

July 8, 1943, North Carolina, by Order No. 2789, denied these railroads' petition in effect saying it would defer action until it could file petition with I. C. C. seeking an investigation of civilian coach fares to and from the State of North Carolina.

July 8, 1943, North Carolina, Alabama, and OPA filed their petitions with I. C. C. to investigate passenger fares.

July 22, 1943, railroads filed thirteenth-section petition with I. C. C. to investigate North Carolina's lower rates.

October 11, 1943, I. C. C. denied petitions of North Carolina, Alabama, and OPA to investigate passenger fares.

October 13, 1943, I. C. C. instituted a thirteenth-section proceeding, No. 29036, *into North Carolina rates.*

December 28-29, 1943, thirteenth-section proceeding was heard at Raleigh. Thereafter it was briefed February 14, 1944, and orally argued February 18, 1944, before full bench of I. C. C.

March 25, 1944, I. C. C. report, without order, was issued (258 I. C. C. 133).

April 26, 1944, North Carolina interests petitioned I. C. C. for reconsideration of its report of March 25, 1944.

May 8, 1944, I. C. C. denied North Carolina's petition for reconsideration.

May 8, 1944, I. C. C.'s order (corrected) was issued to remove prejudice and discrimination found to exist, account of the lower intrastate fares, by increasing them to the interstate level which was found to be reasonable.

June 5, 1944, North Carolina sued in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division, to enjoin, annul, and set aside the order of I. C. C. of May 8, 1944.

July 20, 1944, statutory three-judge District Court upon its opinion, findings of fact, and conclusions of law, denied the injunction sought and dismissed the suit of the North Carolina interests.

APPENDIX C.

CHRONOLOGICAL HISTORY OF FEDERAL CONSIDERATION OF PASSENGER FARES.

June 10, 1918, Director General of Railroads increased the 2.5-cent basic passenger fare that had been in effect since 1908 to 3 cents.

August 26, 1920, under *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C. 220, 242, in addition to the freight-rate increases therein authorized, the 3-cent fare was increased 20 per cent making it 3.6 cents per mile for travel in coaches and sleeping and parlor cars; also a surcharge of 50 per cent of the charge for space occupied in sleeping or parlor cars was provided to accrue to the railroads.

July 1, 1922, under *Reduced Rates, 1922*, 68 I. C. C. 676, 727, 734-737, substantial reductions were made in the freight-rate increases authorized in *Ex Parte 74*. The passenger fares increased in *Ex Parte 74* were not reduced.

November 15, 1937, fares of 2 cents in coaches and 3 cents in sleeping or chair cars were made effective under Docket 26550, *Passenger Fares and Surcharges*, (1936), 214 I. C. C. 174, wherein the 3.6 cents per mile in all classes of equipment was reduced by the I. C. C. and the surcharge of 50 per cent of sleeping or chair car space occupied was eliminated.

February 10, 1942, fares of 2 cents became 2.2 cents and 3 cents became 3.3 cents, and have been continued (though freight increases have been suspended) under I. C. C.'s orders in *Ex Parte* 148, *Increased Railway Rates, Fares, and Charges, 1942*, as follows:

January 21, 1942 March 2, 1942	248 I.C.C. 545
April 6, 1943	255 I.C.C. 357
November 8, 1943	256 I.C.C. 502
May 12, 1944	258 I.C.C. 455
December 12, 1944	259 I.C.C. 159

I.C.C., by its orders in thirteenth-section proceedings, incident to *Ex Parte 148* has ordered:

Intrastate commutation fares in Rhode Island increased 10 per cent, Docket 28827, *Rhode Island Commutation Fares*, 253 I. C. C. 383, September 8, 1942.

Intrastate fare of 3 cents in Texas increased to 3.3 cents, Docket 28846, *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, December 18, 1942.

Intrastate coach fares in North Carolina increased from 1.65 cents to 2.2 cents in Docket 29036, *North Carolina Intrastate Coach Fares*, 258 I. C. C. 133, March 25, 1944. (The report and order embraced four thirteenth-section proceedings; not only North Carolina, but Alabama, Kentucky, and Tennessee as well. Hence, the title of the report happened to become "Alabama Intrastate Fares" embracing the other three cases.)

APPENDIX D.

FINDINGS OF THE INTERSTATE COMMERCE COMMISSION AND EVIDENCE FROM THE RECORD IN THE NORTH CAROLINA CASE, I. C. C. DOCKET 29036, SUPPORTING SUCH FINDINGS.

FINDING, 258 I. C. C., at 146:

All trains are available to and are used by both interstate and intrastate passengers and services accorded both classes of passengers are substantially the same. The illustrations given are typical. (R. 86).

SUPPORTING EVIDENCE:

In the operation of trains into, out of, and across North Carolina no distinction is made with respect to interstate and intrastate passengers. Both travel in the same coaches. In the physical operation of trains in North Carolina there are no trains which are operated solely for intrastate travel. (Blackwell, R. 154, 155; Barry, Exhibit 1, R. 301.)

There is a substantial travel of passengers between all points shown on Exhibits 2 (R. 306-308) and 3 (R. 309-311) (Barry, R. 172).

No distinction is made in the handling of interstate and intrastate passengers into and out of the State of North Carolina or within the State of North Carolina (Barry, R. 173).

Passenger trains operated by the Seaboard in North Carolina are used both for interstate and intrastate service. Interstate and intrastate passengers commonly ride on the same trains. There is no difference in the equipment of through trains. (Makinson, R. 236.)

Both interstate and intrastate passengers in North Carolina are handled under the same conditions on the same trains (N. C. Utilities Comsn., Hunter, R. 254).

"In the very nature of things the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together." (Order No. 2789 of N. C. Utilities Com., dated July 8, 1943, R. 140)

FINDING, 258 I. C. C. at 145-146:

Interstate and intrastate passengers are carried on the same trains and generally in the same cars, and interstate passengers have to pay higher fares than intrastate ones for corresponding distances (R. 85).

FINDING, p. 146:

Charlotte, N. C. to Spartanburg, S. C. 75 miles. fare $1.65
Charlotte, N. C. to Greensboro, N. C. 94 miles. . fare 1.55
(R. 85).

SUPPORTING EVIDENCE:

Passengers are actually traveling from a point without the State of North Carolina to a point within the state, and are also traveling from a point within the state to another point within the state (Buechler, Exhibit 4, R. 312, 182, 183).

Passenger trains operating in the State of North Carolina carry both intrastate and interstate passengers who frequently ride on the same trains and in the same coaches and there is no reason which would justify the maintenance of a one-way fare of only 1.65 cents per mile within the State of North Carolina when a passenger to or from points within the state or passing through the state is required to pay 2.2 cents a mile (Barry, Exhibit 1, R. 301).

Examples from Exhibit 3 (R. 309-311) of fares paid by intrastate passengers contrasted with those paid by interstate passengers for approximately the same distance, which illustrate the discrimination against interstate passengers:

	Distance Miles	One-Way Coach Fare	Difference in Cost in Favor Intrastate Passenger
Asheville, N. C. to Athens, Tenn. .....(2.2¢)	184	$4.11	
Asheville, N. C. to Greensboro, N. C. ....(1.65¢)	191	3.20	$0.91
Asheville, N. C. to Atlanta, Ga. .....(2.2¢)	254	5.61	
Asheville, N. C. to Durham, N. C. .....(1.65¢)	246	4.20	1.41
Asheville, N. C. to Chattanooga, Tenn. ...(2.2¢)	240	5.32	
Asheville, N. C. to Durham, N. C. .....(1.65¢)	246	4.20	1.12
Asheville, N. C. to Charleston, S. C. ....(2.2¢)	293	6.49	
Asheville, N. C. to Henderson, N. C. ....(1.65¢)	287	4.90	1.59
Asheville, N. C. to Nashville, Tenn. .....(2.2¢)	346	7.70	
Asheville, N. C. to Kinston, N. C. .....(1.65¢)	347	5.80	1.90
Charlotte, N. C. to Danville, Va. .....(2.2¢)	142	3.15	
Charlotte, N. C. to Ridgecrest, N. C. ....(1.65¢)	142	2.40	0.75
Sharlotte, N. C. to Easley, S. C. .....(2.2¢)	205	4.55	
Charlotte, N. C. to Selma, N. C. .....(1.65¢)	203	3.20	1.35
Durham, N. C. to Clemson, S. C. .....(2.2¢)	285	6.38	
Durham, N. C. to Hot Springs, N. C. ....(1.65¢)	284	4.85	1.53
Greensboro, N. C. to Easley, S. C. .....(2.2¢)	212	4.73	
Greensboro, N. C. to Wilmington, N. C. ..(1.65¢)	213	3.60	1.13
Salisbury, N. C. to Clemson, S. C. .....(2.2¢)	180	4.04	
Salisbury, N. C. to Hot Springs, N. C. ..(1.65¢)	179	3.05	0.99
Winston-Salem, N. C. to Camden, S. C. ..(2.2¢)	172	3.81	
Winston-Salem, N. C. to Asheville, N. C. (1.65¢)	171	2.85	0.96

(Barry, Exhibit 3, R. 309-311, 172)

Examples from Exhibit 4 (R. 312) of the number of tickets actually sold by Southern Railway ticket agents during the month of November, 1943, to and from the points listed in the exhibit:

	Miles	No. of tickets
Danville, Va. to Greensboro, N. C.	48	151
vs.		
Charlotte, N. C. to Greensboro, N. C.	94	473
Columbia, S. C. to Charlotte, N. C.	108	319
vs.		
Greensboro, N. C. to Charlotte, N. C.	94	362
Charlotte, N. C. to Greensboro, N. C.	94	472
vs.		
Charlotte, N. C. to Spartanburg, S. C.	75	252

(Buechler, Exhibit 4, R. 312)

Exhibit 4 shows that persons are actually traveling between the points listed, some paying intrastate fares and some paying interstate fares (Buechler, R. 182, 183).

The E. F. Craven Company, Greensboro, N. C., has six salesmen traveling within the State of North Carolina and they are now traveling more by train than they did a few years ago (Russell, R. 266).

In describing the coach service Mr. Russell, speaking for the Craven Co. and the North Carolina membership of 3600 in the Travelers Protective Association, used only one trip; Raleigh, N. C., to Greensboro, N. C., thence to Greenville, S. C., and return to Greensboro, N. C. (R. 266, 267).

An investigation developed that business concerns located outside of the State of North Carolina ship their products into that state in competition with those located within the state. Salesmen and sales supervisors for these interstate concerns travel by train into North Carolina, and pay the interstate fare. (Haynes, R. 191, 192.)

Among the manufacturing concerns which do business in North Carolina in competition with similar concerns within that state are fertilizer, scrap dealers, glass and paints, flour and feed mills, creosoting plants, tobacco, pulpwood, paper container companies, shoe manufacturers, log and lumber, foundry and machine, cotton mill supplies, electric supply, fire extinguisher, plumbing fixtures, belting, and brick and tile (Haynes, R. 191-195, 199-200).

Exhibit 7 (R. 314) shows two instances where interstate passengers going to the same destination as intrastate passengers and traveling approximately the same distance pay a higher fare. Two passengers, one from Mullins, S. C., going to Hallsboro, N. C., about 40 miles, pays 92 cents, and an intrastate passenger from Wilmington to Hallsboro for approximately the same distance pays 72 cents. Trains operate from Mullins to Hallsboro and also from Wilmington to Hallsboro. Passengers actually ride on those trains. (Lynch, R. 187.)

Interstate and intrastate passengers ride in the same train, and may sit in the same coach. An intrastate pas-

senger from Weldon, N. C., to Smithfield, N. C., pays $1.45 and an interstate passenger from Fayetteville, N. C., to Florence, S. C., pays $1.83. (Lynch, Exhibit 7, R. 314, 188.)

Passengers traveling in the same train under the same conditions should not be charged different fares (Lynch, R. 188).

The lower fares intrastate in North Carolina permit two passengers on the same train to pay different rates per mile for that part of the trip in North Carolina. An interstate passenger from Henderson, N. C., to Chester, S. C., pays for that part of his trip from Henderson to Monroe, N. C., $1.04, more than the intrastate passenger between the same points. A person living in Roanoke Rapids, N. C., who desires to go from that point to Norfolk, Va., pays a coach fare of $1.83, whereas if he went to Raleigh, N. C., he pays $1.55 for a greater distance. (Makinson Exhibit 13, R. 383, 384, 238.)

"On Seaboard Railway train No. 18, of November 16, 1943, there were two passengers on the train, and I have the tickets that each one of them surrendered. One is an intrastate ticket from Norlina to Littleton, North Carolina. The other is an interstate ticket from Norlina to Portsmouth, Virginia. One man paid 1.65 a mile, and the other paid 2.2 cents a mile. (Makinson, R. 239.)

. . . . . .

"The Witness: Same train, starting in North Carolina, ending up in Virginia. (R. 239)

"Here is another, two more tickets, train No. 9, starting on November 17th, ending November 18, 1943, two passengers on that train. One had a ticket from Raleigh to Hamlet, which was intrastate. He paid 1.65 cents a mile for his ticket. Another passenger in the same coach had a ticket from Raleigh to Athens, Georgia, for which he paid $8.47, which was the rate 2.2 cents a mile plus the tax."
(Makinson, R. 239.)

FINDING, 258 I. C. C. at 146:

Differences between fares over interstate and intrastate routes between points in same state (R. 85).

SUPPORTING EVIDENCE:

The intrastate fare of 1.65 cents per mile in North Carolina results in a different fare via one route than via another route between the same points, the other route being an interstate route between two points within the State of North Carolina. There is nothing to prevent passengers from traveling over the intrastate route, and they do it. (Lynch, Exhibit 6, R. 313, 186.)

There are nine through passenger trains operated by Southern Railway north of Charlotte in each direction in North Carolina, or eighteen in all. These trains run through the State of North Carolina and they each make six or seven stops within the state. (Barry, R. 174.)

The "streamliners" on Southern Railway make six stops within the State of North Carolina. They pick up passengers in North Carolina and carry them to another point in North Carolina. (Barry, R. 176, 177.)

Streamliners are generally known as the coach trains on which there are reserved seats; when they are sold to capacity no more tickets are sold (Barry, R. 289).

The conditions obtaining in North Carolina with respect to crowded condition of trains are no different from those in other states (Barry, R. 286-289).

Operating conditions in North Carolina, except in the mountainous sections, are similar on all roads (Blackwell, R. 157, 161).

FINDING, 258 I. C. C. at 147:

Intrastate fares may be used to defeat and break down the interstate fares and thereby reduce the revenues on interstate traffic (R. 86).

Passengers destined to points outside of the respective states may now purchase intrastate tickets to points on or

near the state line and either rebuy tickets or pay cash for the remainder of the journey (R. 86).

Respondents are convinced that this practice is common. That their elimination would have an important effect upon additional revenues which they would receive if the intrastate fares were on the same level as the interstate ones. (R. 87.)

Supporting Evidence:

There is opportunity for persons to defeat the through interstate fares by buying to a point within the State of North Carolina and then rebuying. Illustrations are shown on Exhibit 2 (R. 306-308). Persons actually travel between the points shown on Exhibit 2. (Barry, R. 172.)

Examples of possible reductions of interstate fares by purchasing to the point nearest the state line and rebuying therefrom to interstate destinations:

Asheville, N. C. to Washington, D. C.	(2.2¢)		$10.49
Asheville, N. C. to Reidsville, N. C.	(1.65¢)	$3.65	
Reidsville, N. C. to Washington, D. C.	(2.2¢)	5.76	9.41
Saving			1.08
Charlotte, N. C. to Richmond, Va.	(2.2¢)		6.23
Charlotte, N. C. to Reidsville, N. C.	(1.65¢)	2.00	
Reidsville, N. C. to Richmond, Va.	(2.2¢)	3.63	5.63
Saving			0.60
Raleigh, N. C. to Knoxville, Tenn.	(2.2¢)		8.91
Raleigh, N. C. to Hot Springs, N. C.	(1.65¢)	5.25	
Hot Springs, N. C. to Knoxville, Tenn.	(2.2¢)	2.05	7.30
Saving			1.61
Greensboro, N. C. to Nashville, Tenn.	(2.2¢)		11.92
Greensboro, N. C. to Hot Springs, N. C.	(1.65¢)	3.85	
Hot Springs, N. C. to Nashville, Tenn.	(2.2¢)	6.86	10.71
Saving			1.21
Salisbury, N. C. to Louisville, Ky.	(2.2¢)		12.14
Salisbury, N. C. to Hot Springs, N. C.	(1.65¢)	3.05	
Hot Springs, N. C. to Louisville, Ky.	(2.2¢)	8.18	11.23
Saving			0.91
Durham, N. C. to Chattanooga, Tenn.	(2.2¢)		10.78
Durham, N. C. to Hot Springs, N. C.	(1.65¢)	4.85	
Hot Springs, N. C. to Chattanooga, Tenn.	(2.2¢)	4.47	9.32
Saving			1.46

Goldsboro, N. C. to Nashville, Tenn.	(2.2¢)		14.78
Goldsboro, N. C. to Hot Springs, N. C.	(1.65¢)	6.00	
Hot Springs, N. C. to Nashville, Tenn.	(2.2¢)	6.86	12.86
	Saving		1.92
Winston-Salem, N. C. to Memphis, Tenn.	(2.2¢)		16.02
Winston-Salem, N. C. to Hot Springs, N. C.	(1.65¢)	3.50	
Hot Springs, N. C. to Memphis, Tenn.	(2.2¢)	11.40	14.90
	Saving		1.12

(Barry, Exhibit 2, R. 306, 172)

Present passenger service in North Carolina could not be furnished to people of that state if it had nothing to rely on but purely intrastate traffic (Barry, R. 175).

It is possible for passengers to defeat the through rate by buying a ticket to or from a point in North Carolina and then rebuy. From Richmond, Va., to Wilmington, N. C., the one-way interstate fare is $5.43. A passenger may buy a ticket from Richmond to Rocky Mount, N. C., and then buy a ticket from Rocky Mount to Wilmington, at a total cost of $4.78, thereby saving 65 cents. Similarly a passenger from Norfolk, Va., to Fayetteville, N. C., pays $4.58. He may buy to Rocky Mount and then rebuy at a total cost of $4.12, saving 46 cents. There is nothing to prevent the passenger from getting off at Rocky Mount and buying the ticket. He has about an hour in which to do it. (Lynch, Exhibit 5, R. 313, 185.)

Passengers defeat the through interstate fares by buying and rebuying. Exhibit 13 indicates how the lower intrastate fares in North Carolina make it possible for passengers to beat the fare in rebuying. From Raleigh to Atlanta the through interstate fare is $9.31, which can be cut 80 cents by a passenger buying to Monroe, which is a division point, and rebuying. (Makinson, Exhibit 13, R. 383, 238, 239.)

FINDING, 258 I. C. C. at 147:

An increase in the intrastate fares to the interstate level under existing conditions will not result in any important loss of traffic to other forms of transportation and will pro-

duce increased revenue substantially equivalent to those estimated by them (R. 87).

SUPPORTING EVIDENCE:

In the event the present 1.65-cent fare within North Carolina is increased to 2.2 cents per mile it would not have any effect on the traveling public. The increase would not divert passenger travel to busses or other means of transportation. (Barry, R. 171.)

If the fares are increased in North Carolina it would not keep anybody off the trains (Makinson, R. 243).

The fair average distance of a coach haul within the State of North Carolina is approximately thirty miles (Barry, R. 170).

FINDINGS, 258 I. C. C. at 147, 154, 155:

Additional revenue per annum respondents would have received if 2.2 cents were in effect intrastate (R. 86):

Alabama	$750,000.
Kentucky	526,000.
North Carolina	558,000.
Tennessee	556,000.
	$2,390,000.

SUPPORTING EVIDENCE:

The actual revenue loss of the thirteen railroads operating in North Carolina by reason of the refusal of the North Carolina Commission to permit the fare of 1.65 cents per mile to be increased to 2.2 cents per mile between December 1, 1942, and September 30, 1943, was $465,578. On basis of a year, the loss would amount to $558,694.

For the twelve months ended February 28, 1943, the amount would have been $432,150 and for the twelve months ended September 30, 1943, $566,823 (Tassin, Exhibit 9, R. 317, 202).

The cumulative loss in the States of Alabama, Kentucky, Tennessee, and North Carolina, by reason of the failure of the authorities of these states to permit the fare of 1.65 cents per mile to be increased to 2.2 cents per mile for the twelve-month period December 1, 1942, through November 30, 1943, amounts to $2,420,035 (Tassin, Exhibit 10, R. 343, 215).

Rate reductions in these states would have effect on rates in other states (161 I. C. C., at 282, R. 216).

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 560

STATE OF NORTH CAROLINA ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 561

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 548), *State of North Carolina* v. *United States*, is reported in 56 F. Supp. 606.

The report of the Interstate Commerce Commission (R. 69) is reported in 258 I. C. C. 133.

JURISDICTION

The final decree of the District Court was entered on July 22, 1944 (R. 545). The petition for appeal was filed and allowed on August 21, 1944 (R. 575, 583). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a) and under section 238 of the Judicial Code, as amended February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on November 13, 1944 (R. 596).

STATUTES

Pertinent statutory provisions are reproduced in the Appendix, *infra*, pp. 127–130.

QUESTIONS PRESENTED

In a proceeding under section 13 (3) and (4) of the Interstate Commerce Act, the Commission found that the interstate passenger coach fare of 2.2 cents per mile, approved in previous proceedings and in effect on interstate traffic generally on all railroads to and from points in North Carolina, was just and reasonable, and that the intrastate coach fare of 1.65 cents per mile, required by State authority and in effect on the same railroads for similar service in North Carolina,

caused undue prejudice against interstate passengers and unjust discrimination against interstate commerce. By order dated May 8, 1944 (R. 507) the Commission required that the carriers remove this prejudice and discrimination by increasing the 1.65-cent intrastate fare to the interstate level of 2.2 cents. The question presented is the validity of this order. Subordinate questions appear to be as follows:

I. Whether the order is within the Commission's authority.

II. Whether the Commission's findings are supported by the evidence.

III. Whether the Commission granted a full hearing to the State Commission.

IV. Whether the court below erred in refusing to receive certain new evidence which was not a part of the record before the Commission.

V. Whether the Commission's finding of unjust discrimination against interstate commerce, resulting from the failure of the intrastate traffic to bear its fair proportionate share of the aggregate revenue needed to maintain adequate and efficient railway transportation service, is invalid on the ground that the total earnings of the carriers from all their traffic have recently risen to a point deemed by appellants to be in excess of a fair return.

VI. Whether the Commission, in finding that the low intrastate fares operated unjustly to dis-

criminate against interstate commerce, failed to give full consideration to wartime conditions and the stabilization legislation.

STATEMENT

On January 21, 1942, by order (R. 521) in *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, hereinafter called ***Ex Parte 148***, the Commission found that a general increase in passenger fares of 10% would be reasonable and lawful, and authorized such an increase to be made effective by the rail carriers generally throughout the country (R. 72). This increase became effective on interstate traffic February 10, 1942, and resulted in fares of 3.3 cents a mile in Pullman cars throughout the country, of 2.2 cents a mile in coaches in the East (north of the Ohio and Potomac rivers), and also in the West, and of 1.65 cents a mile in the South (east of the Mississippi River). Similar increases were made effective shortly thereafter on intrastate traffic in all states (R. 72, 73).

By an amendatory order of August 1, 1942 (R. 524), in *Ex Parte 148*, upon petition of the southern carriers, the Commission, having previously found that a coach fare of 2 cents plus an increase of 10% would be reasonable for application throughout the country, authorized the southern lines to increase their interstate coach fare from 1.65 to 2.2 cents. These increases became effective October 1, 1942, with the result that the

coach fare throughout the country became uniform at 2.2 cents upon interstate traffic (R. 94). Similar increases were permitted upon intrastate traffic by the commissions of Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina (R. 74, 298). The commissions of North Carolina, Alabama, Kentucky, and Tennessee refused to authorize the increase (R. 74, 298–299). Thereupon the carriers invoked section 13 (3) and (4) of the Interstate Commerce Act. This invocation was the inception of the proceedings before the Commission culminating in the order here under attack, which requires that the intrastate fares in these four states shall be brought up to the interstate level.[1] Separate hearings were held in the four proceedings but they were argued together and are covered by one report (R. 69–103).

The proceeding involving North Carolina was initiated by a petition (R. 121–128) filed in July 1943, by the Atlantic Coast Line Railroad Company, the receivers of the Seaboard Air Line Railway Company, the Southern Railway Company, and other common carriers by railroad engaged in the transportation of persons and property in interstate commerce to, from, and between points in North Carolina, and also in

[1] Appeals from the decree of the District Court for the Western District of Kentucky, sustaining the Commission's order in the Alabama, Kentucky, and Tennessee cases, are before this Court, Nos. 574 and 592, and are assigned for argument immediately following this case.

intrastate commerce within the state. In response to this petition the Commission, in October 1943, ordered the investigation (R. 141–2), naming the interested carriers as respondents, to determine whether the relation between the interstate and intrastate coach fares caused violations of section 13 (3) and (4) and, if so, what fares should be prescribed to correct the violations.

Hearing was held in December 1943. The carriers, the state commission, the Federal Price Administrator, and certain other parties appeared and presented evidence (R. 143–409). Briefs were filed and the issues were orally argued before the Commission. On March 25, 1944, the Commission rendered its report (R. 69–103), deciding this case and the three cognate cases. *Alabama Intrastate Fares*, 258 I. C. C. 133. The report makes full and adequate findings of fact, summarized below, and reaches the conclusion that the disparity between the interstate and intrastate fares causes undue preference and prejudice and unjust discrimination in violation of section 13 (3) and (4). In the subsequently issued order, dated May 8, 1944 (R. 507), which is the order here challenged, the Commission required this unlawfulness to be corrected by increase of the intrastate fares to the interstate level.

Genesis of Disparity

Certain of the basic facts, shown by the evidence and found in the Commission's report,

which explain the genesis of the disparity between the interstate and the intrastate fares in question, may be briefly stated.

In *Increased Rates, 1920*, 58 I. C. C. 220, responsive to the new regulatory policy adopted by Transportation Act, 1920, the Commission authorized, besides varying increases in freight rates, a country-wide increase in passenger fares of 20% plus a Pullman surcharge. Thereby the interstate fare of 3 cents a mile then in effect throughout the country became 3.6 cents in coaches and 3.6 cents plus the surcharge in sleeping and parlor cars (R. 71, 294, 295; 214 I. C. C. 174, 186).

Most of the state commissions authorized similar intrastate increases. A few declined to do so, and in subsequent proceedings under section 13 the Commission required the increases. See, e. g., 59 I. C. C. 391, order sustained, *Wisconsin R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; 59 I. C. C. 290, ordered sustained, *New York* v. *United States*, 257 U. S. 591. Thus, these fares became effective on both interstate and intrastate traffic throughout the United States.

These increased fares remained in effect for 13 years. During this period there was a marked decline in passenger traffic. In 1933, the decline, compared with 1923, was 58% in the East, 63.5% in the South, 66% in the West (214 I. C. C. 174, 178). Newly constructed hard-surfaced highways gridironed the country, bus transportation ap-

peared nearly everywhere, and millions of private automobiles were purchased. These developments were largely responsible for the decline in railway travel (R. 71).

In the South numerous efforts were made by the carriers to check the drastic decline, but without success. Then several of the carriers began to experiment with reduced fares between particular points. By December 1, 1933, the reductions had become general. Effective on that date, most of the southern lines reduced the fares in Pullmans to 3 cents a mile, eliminated the surcharges, and lowered the coach fare to 1.5 cents a mile (R. 72, 296; 214 I. C. C. 174, 187).[2] These reductions were made effective on interstate and intrastate traffic alike by the voluntary action of the carriers; they were not prescribed in any instance by either federal or state authority. On the same date the railroads west of the Mississippi also eliminated the surcharges and reduced their basic fares to 3 cents in Pullmans and 2 cents in coaches (214 I. C. C. 201).

In the East the fares remained on the 1920 bases until 1936. In that year, after a comprehensive country-wide investigation, the Commission determined that just and reasonable basic fares would be 3 cents a mile in Pullmans, with-

[2] This discussion, for brevity, deals only with one-way fares, which are typical, neglecting changes in round-trip fares. The details are given in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 188–201.

out any surcharge, and 2 cents a mile in coaches. *Passenger Fares and Surcharges,* 214 I. C. C. 174.

These basic fares, which, after the 1936 order, were generally 3 cents a mile in Pullmans throughout the country, 2 cents in coaches in the East and West, and 1.5 cents in coaches in the South (~~214~~ 248 I. C. C. 545, 564), remained in effect until February 10, 1942, when they were increased 10% under the authorization of *Ex Parte 148.*

The proceeding in *Ex Parte 148* was initiated in December 1941 shortly after Pearl Harbor, by petition of the rail carriers of the country for authority to increase both their freight rates and passenger fares 10%. They pointed to substantial increases in operating costs which threatened to impair their financial resources and their ability to render adequate and efficient transportation service. Increases in wages aggregating $311,711,000 per year, resulting from mediation agreements, had become effective. Other wage increases would total $20,000,000 annually. Prices of materials and supplies had increased. Upon recommendation of the War Department, the railways were taking precautionary measures to safeguard their properties and operations during the war, adding costs of approximately $30,000,000 a year. They were being called upon frequently, in connection with the transportation of troops and property for the United States,

to perform many special and unusual services, which further added to their costs (248 I. C. C., 551, 607, 609, 613).

The investigation in *Ex Parte 148* was completed January 14, 1942, following extensive hearings. The Commission quickly reached the conclusion that the 10% increase in passenger fares should be approved. On January 21 it issued an order (R. 521–523) finding the proposed increase in fares to be necessary to meet increased operating expenses resulting from increases in wages and in the cost of materials and supplies, and from additional expenditures to safeguard carrier properties and operations during the emergency, that the proposed increase in fares was necessary to enable the carriers to continue to render adequate and efficient transportation service during the emergency, and that the proposed increased fares would be reasonable and lawful.

On March 2, 1942, the Commission issued its report in that investigation, *supra,* finding, as to freight rates, that increases ranging up to 6% were warranted, and affirming the previous findings regarding passenger fares, noting that the increased fares had been made effectively generally on interstate traffic February 10, 1942 (p. 566).[3] On vari-

[3] The report is devoted largely to freight rates. Reference to passenger fares is made on pp. 549, 550, 564–566, and in the "Conclusions and Findings," pp. 606–613.

A copy of the order of January 21, 1942, in *Ex Parte 148* was introduced in evidence in the court below. (R. 120, 521–

ous subsequent dates these increased fares also became effective on intrastate traffic in al states (R. 73).

Had the coach fares in southern territory then been on the normal basis of 2 cents prevailing elsewhere in the country, this increase would have raised them to 2.2 cents. But the low 1.5-cent fares were still in effect and the 10% increase lifted them only to 1.65 cents. On July 14, 1942, the southern carriers petitioned the Commission for the necessary authority to increase coach fares to the 2.2-cent basis (R. 297). The Commission, having found in *Passenger Fares and Surcharges, supra,* that 2 cents was a reasonable basic coach fare for application on railroads generally throughout the country, including the lines in southern territory, by order of August 1, 1942 (R. 524), authorized the southern carriers to apply the increase of 10%, approved in *Ex Parte 148* to a basic fare of 2 cents, and modified accordingly the original order in *Ex parte 148*.

523.) Copies of the reports of March 2, 1942, 248 I. C. C. 545, April 6, 1943, 255 I. C. C. 357, November 8, 1943, 256 I. C. C. 502, May 12, 1944, 258 I. C. C. 455, in *Ex Parte 148*, and the report of February 28, 1936, in *Passenger Fares and Surcharges*, 214 I. C. C. 474, were furnished to the court below (R. 119–120), as these reports form a significant part of the background of this case, but they were not introduced as evidence, because of course the courts take judicial notice of the published reports of the Commission. Since then the Commission has issued a further report in *Ex Parte 148*, dated December 12, 1944, 259 I. C. C. 159, to which attention is invited.

As stated above, the southern carriers established the 2.2-cent fare on interstate traffic effective October 1, 1942, with the result that the coach fare became uniform at 2.2 cents upon interstate traffic throughout the country. Thereupon the southern carriers undertook to establish the same coach fare upon intrastate traffic in the various southern states, and, as we have seen, they were permitted to do so by the state commissions of Florida, Georgia, Louisiana, Mississippi, Virginia, and South Carolina (R. 74, 298). The carriers' application to the North Carolina commission for such authority was filed October 12, 1942 (R. 124). By report and order of July 8, 1943 (R. 128–140) that commission withheld authorization of the increase, and, as an increase in intrastate fares in North Carolina may not lawfully be made without the consent of the state commission (R. 298), the 1.65-cent fares were necessarily kept in effect in that state. Fares at this level also remained in effect intrastate in Alabama, Kentucky, and Tennessee, due to the refusal of the state commissions to approve increases to the interstate level.

The result of these diverse actions was that the 2.2-cent coach fare was made effective throughout the United States on interstate traffic and in 44 of the 48 states on intrastate traffic. In other words, it was made effective everywhere in the country except intrastate in North Carolina, Alabama, Tennessee, and Kentucky.

On July 22, 1943, the North Carolina carriers filed the aforesaid petition with the Interstate Commerce Commission, invoking section 13 of the Interstate Commerce Act. The resulting order does no more than to require the intrastate fares in North Carolina (and in Alabama, Tennessee, and Kentucky) to be brought up to the level in effect elsewhere throughout the United States.

Summary of Commission's Findings

Section 13 (4), forbidding "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," as construed by this Court, inhibits two distinct types of discrimination growing out of disparities between interstate and intrastate rates: First, undue prejudice against interstate passengers, shippers, or localities; second, unjust discrimination against interstate commerce resulting from the failure of the intrastate rates to bear their fair proportionate share of the revenue required to maintain adequate national railway transportation service. *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *Florida* v. *United States*, 282 U. S. 194; *Georgia Comm.* v. *United States*, 283 U. S. 765; *United States* v. *Louisiana*, 290 U. S. 70; *Florida*

v. *United States*, 292 U. S. 1; *Ohio* v. *United States*, 292 U. S. 498.

The Commission here found the existence of both these kinds of prejudice or discrimination; it found that there was undue preference of intrastate passengers and undue prejudice against interstate passengers, and also that the revenue deficiencies resulting from the low intrastate fares caused unjust discrimination against interstate commerce.

The report is replete with basic findings of fact, which lead to and support six ultimate findings or conclusions (R. 95–96), which are here summarized.

In determining the question presented, the Commission first considered the reasonableness of the interstate fares. After reviewing the history of rail fares since 1908 (R. 71), and considering in detail various facts and circumstances affecting the level of the interstate fares, particularly in the South (R. 74–82), it made the ultimate finding (R. 95) that:

> 1. The interstate one-way and round-trip coach fares now in effect to, from, and through points in Alabama, Kentucky, North Carolina, and Tennessee, and the interstate round-trip fares applicable in sleeping and parlor cars now in effect to,

from, and through points in Alabama and Tennessee, are just and reasonable.[4]

The Commission then considered the relation of the interstate and intrastate fares (R. 82–85), and found the existence of the disparity:

> 2. The intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, with certains exceptions hereinbefore referred to and not here in issue, and the intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in the several States mentioned in this finding (R. 95).

Having found the interstate fares to be just and reasonable, thus establishing a proper standard of comparison, and having found a disparity between the intrastate fares and *corresponding* interstate fares, the next question for consideration was whether there were differences in

[4] The carriers' petition to the Commission in the North Carolina case brought in issue the round-trip intrastate fares in coaches as well as the one-way intrastate coach fares. The intrastate round-trip coach fares were 1.485 cents a mile, return limit 15 days; the interstate round-trip coach fare, return limit three months, was 1.98 cents a mile. (R. 82, 84.) That petition did not, however, bring in issue the intrastate fares in Pullmans, either one-way or round-trip, as they were then the same as those applying interstate. (R. 84.)

transportation conditions which warranted the disparity. It was found that the carriers in North Carolina, Alabama, Tennessee, and Kentucky are engaged in the transportation of both interstate and intrastate passengers, and that such passengers "are carried on the same trains and generally in the same cars, but the interstate passengers have to pay higher fares than the intrastate passengers for corresponding distances" (R. 85).

It was found that this condition prevailed throughout the four States involved. "Both intrastate and interstate passengers travel side by side under substantially similar circumstances and conditions on practically every passenger car on every branch and main line operated by respondents in each of these four States. The evidence in each of these proceedings, therefore, contrary to the situation dealt with in *Wisconsin R. Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580, establishes a condition which is State-wide * * *" (R. 94).

These basic findings of fact lend full support to the ultimate findings of similarity of transportation conditions and of undue preference and prejudice as between interstate and intrastate passengers:

> 3. The conditions affecting the one-way and round-trip transportation of passengers in coaches within these four States,

and the round-trip transportation of passengers in sleeping and parlor cars within Alabama and Tennessee, intrastate on the one hand, and interstate to, from and through those respective States on the other, are substantially similar (R. 95).

4. Interstate passengers in these States travel in the same trains and generally in the same cars with intrastate passengers, but are forced to pay higher fares than the intrastate passengers for like services, to the undue and unreasonable advantage and preference of the intrastate passengers and the undue and unreasonable disadvantage and prejudice of the interstate passengers (R. 95).

The Commission then found the existence of the second type of discrimination declared unlawful in section 13. This ultimate finding, supported by appropriate underlying findings (R. 86–87), reads (R. 95–96):

5. Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares * * *.

After thus finding substantial revenue losses, due to the low intrastate fares, the Commission found (part of finding No. 5) that—

> traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service.

The preceding findings led to the following conclusions:

> 6. The maintenance of intrastate one-way and round-trip coach fares in Alabama, Kentucky, North Carolina, and Tennessee, and of intrastate round-trip fares applicable in sleeping and parlor cars in Alabama and Tennessee, to the extent that such fares are on a lower level than the corresponding interstate fares, causes and will cause undue and unreasonable advantage to and preference of persons in intrastate commerce, undue and unreasonable disadvantage to and prejudice against persons in interstate commerce, and undue, unreasonable and unjust discrimination against interstate commerce; * * * (R. 96).

This finding also specified the manner in which these discriminations should be removed—"by increasing the aforesaid intrastate fares in the respective States to the level of the corresponding interstate fares contemporaneously maintained by repondents to, from, and through such States * * *" (R. 96).

Order not entered until after state authorities were afforded opportunity to correct discriminations found. The Commission refrained

from issuing an order contemporaneously with the report, and left "to respondents and the respective State Commissions the matter of adjusting the intrastate fares" to conform to the findings (R. 96) Cf. *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563, 590–591. The state authorities refused to give their consent to such action (R. 489–490). It was not until then that the Commission made the order here in question, dated May 8, 1944 (R. 507). (The same order made a similar requirement respecting the intrastate fares in Alabama, Kentucky, and Tennessee.) On the same date the Commission denied petitions for rehearing (R. 508–509).

Proceedings in court below. Suit to enjoin the order was filed by the state authorities in June 1944. The Economic Stabilization Director by the Price Administrator, and certain others, intervened in support of the petition. The affected rail carriers intervened in defense of the order. The original effective date of the order, July 1, 1944, was postponed by the Commission at the request of the court until August 1, 1944 (R. 509). Hearing before the court of three judges on submission for final decree (R. 111) was held July 12, 1944 (R. 110–121). The opinion of the court, by Circuit Judge Parker, rendered July 22, 1944 (R. 548), accompanied by findings of fact and conclusions of law (R. 546–547) sustained the Commission's order. Final decree dismissing the

bill (R. 545) was entered on the same day. The appeal to this Court followed.

The increased fares were made effective August 1, 1944, and have since remained in force.

The United States at first filed an answer defending the order (R. 103) but later filed an amended answer (R. 106), taking a neutral position on the ground that two other governmental agencies, the Office of Price Administration and the Interstate Commerce Commission, were aligned in opposition; and it did not participate in the proceedings before the District Court.

SUMMARY OF ARGUMENT

I. The order, requiring removal of discrimination against interstate passengers and interstate commerce, is within the authority conferred by section 13 (3) and (4) of the Interstate Commerce Act. *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591; *Louisiana Commission* v. *United States*, 284 U. S. 125; *Illinois Commerce Comm.* v. *U. S.*, 292 U. S. 474. It has long been established that the Commission, under these provisions, has power to supersede an intrastate rate by prescribing in its stead a new rate which the Commission finds necessary to remove undue prejudice or discrimination to interstate commerce resulting from the maintenance of the intrastate rate. *Illinois Comm.* v. *Thomson*, 318 U. S. 675, 682. The *Wisconsin* decision recognizes that the Commis-

sion is authorized to remove either unjust discrimination against interstate commerce resulting from revenue losses caused by the intrastate rate or undue prejudice against interstate shippers or passengers. Subsequent decisions make it clear that a valid finding of either of these kinds of discrimination is sufficient to support a corrective order. *Florida* v. *United States*, 282 U. S. 194; *Florida* v. *United States*, 292 U. S. 1; *Georgia Comm.* v. *United States*, 283 U. S. 765; *Ohio* v. *United States*, 292 U. S. 498; *United States* v. *Louisiana*, 290 U. S. 70.

II. Substantial evidence supports the order and the findings, upon which it rests, of the existence throughout the State of both types of discrimination forbidden by section 13. The Commission's report reflects the evidence in condensed form, and, as it is not contended that any of the facts found were without support in the evidence, primary resort may be had to the report itself to determine the nature and scope of the evidence. Some of the evidence supporting each of the six major findings, except the second finding which is not challenged, with appropriate record references, is stated in section II hereof, *infra*, page 39. As has been previously mentioned, the reports of the Commission in *Passenger Fares and Surcharges*, *supra*, and the five reports in *Ex Parte 78*, previously cited, form the background of the case.

That the evidence supports the Commission's finding of the reasonableness of the interstate coach fares of 2.2 cents can hardly be doubted That fare is lower than the coach fare of 3 cents which prevailed throughout the country during World War I, lower than the coach fare of 2.5 cents which applied throughout the country for 10 years prior to World War I, and substantially lower than the coach fare of 3.6 cents in effect throughout the country for at least 13 years after August 26, 1920.

The evidence showed changes in conditions subsequent to the Commission's finding in 1936 that coach fares of 2 cents would be reasonable for application throughout the country, including southern territory, which tended, independenty of the evidence and findings in *Ex Parte 148* to support the reasonableness of the increased fare of 2.2 cents.

As evidence of the greatest probative value in determining reasonableness of rates or fares is comparison with other rates or fares for like services (Report, R. 82), the most cogentevidence supporting the finding of reasonableness of the 2.2-cent coach fare is that, prior to the order here involved, coach fares of 2.2 cents had been made effective on interstate traffic throughout the country, with the approval and under the authorizations of the Commission, and that the same fare had also been made effective on inrastate traffic

in all States other than the four involved in these proceedings.

The finding of undue preference and prejudice on a state-wide scale rests upon evidence showing similarity of transportation conditions affecting the interstate and intrastate traffic. In the operation of trains into, out of, across, and within the State, no consideration is given to state lines and no distinction is made between interstate and intrastate passengers. Both classes of passengers travel in the same trains and in the same cars, irrespective of the interstate or intrastate nature of the travel. No trains are operated wholly for intrastate passengers. The interstate and intrastate passengers travel on the same trains and receive the same service but the interstate passengers paid 2.2 cents a mile while the intrastate passengers were required to pay only 1.65 cents a mile. The evidence gave numerous instances of such commingling of interstate and intrastate passengers and the payment of a less fare by the one class than by the other under substantially similar, if not identical, circumstances.

Nothing in the physical operating conditions in North Carolina warrants this difference in fares, for the conditions there are substantially the same as those in adjoining states and throughout southern territory. Nor was this difference in fare justified by differences in service accorded, as the interstate and intrastate passengers were

carried on the same trains and accorded similar service.

The evidence as to the state-wide character of the preference and prejudice was not controverted. Some of the carriers operate streamlined coach trains, giving service superior to that in ordinary coaches, and on some branch lines the passenger service is comparatively inferior, but, as stated by Circuit Judge Parker, intrastate passengers travel on the streamlined trains and interstate passengers travel on the branch lines. The great bulk of the passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations. (Opinion below, R. 567–8.)

The evidence, comprehensive and typical in character, was ample to support the Commission's finding of similarity of interstate and intrastate transportation conditions and of undue preference and prejudice as between interstate and intrastate passengers on all trains operated by these interstate carriers in North Carolina. Cf. *Georgia Comm.* v. *United States*, 283 U. S. 765, 774; *United States* v. *Louisiana*, 290 U. S. 70, 75, 76.

The finding regarding the revenue losses resulting from the maintenance of the subnormal intra-

state fare of 1.65 cents rests upon evidence of audits of tickets or cash fares actually collected from intrastate passengers during various periods, and upon evidence showing that if these passengers had been carried at the fare of 2.2 cents prevailing for interstate passengers on the same trains, the aggregate revenues would have been increased by substantial amounts. There was also evidence that the increase of the intrastate fare to the interstate level would not discourage patronage and would produce increased revenues, aggregating at least $25,000 annually upon North Carolina intrastate passenger traffic.

The evidence as a whole amply sustains all the Commission's basic findings and gives full support to the ultimate finding of the existence, state-wide in scope, of both types of discrimination forbidden by section 13.

The Commission did not err in considering past deficits from passenger traffic. The expression in *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 590, relied upon by appellants, does not prevent the Commission from considering carrier revenues over a period of years.

The evidence established that the intrastate fare, in its relation to the interstate rate found reasonable by the Commission, was unreasonably low. Cf. *Illinois Comm.* v. *United States*, 292 U. S. 474, 483. In a case of this kind the ques-

tion is not whether the intrastate rate is compensatory or confiscatory but whether it causes the forbidden discriminations. The Commission's report and order negative the possibility that a passenger fare of 1.65 cents is now within the zone of reasonableness.

Section 13 (3) explicitly authorizes carriers subject to the act to file petitions with the Commission bringing in issue rates or fares imposed by state authority. No petition, complaint, or evidence by anyone else is required. These provisions permit interstate carriers to show that their intrastate rates, imposed by state authority, cause undue prejudice against interstate passengers, as well as unjust discrimination against interstate commerce. In this respect, section 13 is different from section 3 (1), and its purpose is different. The latter provides protection for individuals, localities, etc., against undue prejudice practiced by the carriers, while section 13 affords a means of relief for carriers against unduly low rates or fares imposed by state authority. The evidence before the Commission plainly shows the existence of undue prejudice against interstate passengers and the resulting injury. This was enough.

III. The Commission accorded the North Carolina commission a full hearing. Appellants' contentions to the contrary are not well taken.

IV. The court below properly held that evidence *de novo* was not admissible.

V. The Commission's finding of unjust discrimination against interstate commerce, resulting from the failure of the intrastate traffic to contribute its fair share of the revenues required for maintenance of adequate and efficient transportation service, is not invalid on the alleged ground that the earnings of the carriers from all their traffic have recently risen to a level deemed by appellants to be in excess of a fair return. In determining whether an intrastate rate which is lower than the reasonable interstate rate for comparable service causes unjust revenue discrimination against interstate commerce, the question is not whether the entire traffic of the carriers involved is earning enough for the maintenance of adequate transportation service but whether the particular intrastate traffic is contributing its fair proportionate share of the revenue needed for this purpose. Decisions of this Court in the *Wisconsin* and other cases make it clear that intrastate traffic is not contributing its fair share of the revenue where the corresponding interstate rates have been found by the Commission to be reasonable, where the intrastate rates are lower than such reasonable interstate rates, where the transportation conditions affecting the interstate and intrastate traffic are substantially similar, and where increase of the intrastate rates will produce increased revenues. Under these decisions and subsequent amendments to the Interstate Commerce Act, failure of intrastate traffic

to contribute its fair share of the revenues needed for maintenance of adequate and efficient transportation service may be found by the Commission to be an unjust discrimination against interstate commerce whether the general earnings of the carriers are low or, during a temporary period of extraordinary traffic volume, are above normal. "Congress as the dominant controller of interstate commerce may * * * restrain undue limitation on the earning power of the interestate commerce system in doing state work * * *" *Wisconsin* case, p. 590. If the railways are to earn sufficient revenue to provide adequate and efficient railway transportation service, the lower the intrastate rates the higher the interstate rates may have to be. Though the original section 15a as enacted in 1920 was amended in 1933 so as to abandon the "group method" of rate making contemplating the fixing of rates so as to produce a fair return upon value for the carriers as a whole or in groups and to repeal the accompanying provision for recapture of earnings in excess of a fair return, the "dovetail relation" between section 15a and section 13 (4) was not disrupted and continues under the amended section 15a. *Florida* v. *United States*, 292 U. S. 1.

Decisions of this Court lend no support to appellant's contention that intrastate traffic may avoid contributing its fair proportionate share of

the needed over-all revenue when the general revenues have risen above a certain level. On the contrary, they recognize that where the intrastate traffic does not bear its fair share of the general burden, there is inevitably a discrimination against interstate commerce, whether the general revenues from all traffic are high or low.

If the state commissions could refuse to bring intrastate rates up to the reasonable interstate level or could require reductions in intrastate rates below that level, on the ground that the interstate transportation system is earning what might be deemed by the state commissions to be more than a fair return, the result might be, if Federal authority were impotent to prevent it, the reduction of the general revenues of the carriers as a whole to such an extent as to require a general increase in interstate rates or fares or to prevent a general reduction in interstate rates or fares. See *Colorado* v. *United States*, 271 U. S. 153, 163

Decisions of this Court have construed section 13 as requiring that the intrastate traffic of the country, which constitutes an important part of the entire traffic, shall bear its fair proportionate share of the revenues needed to maintain an adequate national transportation system and that its fair proportionate share is that contributed by rates found by the Commission to be reasonable and sufficient to yield revenue meeting the tests

of section 15a and the National Transportation Policy.

The fallacy of the Price Administrator's argument lies in its assumption that the law sets "fair return" as the inexorable peak above which railway income shall never rise. The argument overlooks that the "fair return" method of rate making was repealed in 1933 along with the recapture clause, and that the new standard leaves it to the administrative judgment of the Commission to prescribe rates to yield sufficient revenue to enable the carriers to provide adequate and efficient railway transportation service.

To limit railway income, during a temporary period of heavy war traffic, to some indefinite level that might be deemed to be a fair return under present conditions, though the law does not now fix a fair return, would restore the most objectionable feature of the old section 15a, which provided for recapture of excess earnings in any year, regardless of previous or possible future deficits.

By the provisions of the amended section 15a and of the National Transportation Policy, responsibility of determining the revenue needs of the interstate railway system has been placed upon the Commission. The Commission has performed this duty. At short intervals during the war period it has carefully inquired into carrier revenues. *Ex Parte 148,* 248 I. C. C. 545, 255

I. C. C. 357, 256 I. C. C. 502, 258 I. C. C. 455, 259 I. C. C. 159. After granting freight rate increases ranging up to 6% and passenger fare increases of 10%, in the first report rendered shortly after Pearl Harbor, it suspended all the freight rate increases about a year later, until December 31, 1943, and in subsequent reports has further suspended them from time to time until the end of 1945, but has not disturbed the passenger fare increase. In each of the subsequent surveys it has found no occasion to change these rate levels, finding that these rates meet the objectives of the National Transportation Policy as defined in the Interstate Commerce Act and the standards of section 15a (2) of the Act, and are reasonable and just.

The rates of return of the carriers involved, as indicated by evidence of record taken in December 1943, are not unduly high measured by the discarded standard of fair return fixed under the repealed provisions of section 15a.

VI. In finding that the low intrastate fares operated to discriminate against interstate commerce, the Commission did not fail to give full consideration to wartime conditions and the stabilization legislation. It is established by *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 114, *Vinson* v. *Washington Gas Co.,* 321 U. S. 489, and *I. C. C.* v. *Jersey City,* 322 U. S. 503, that the price control legislation withheld authority from the

Price Administrator to control the rates of common carriers already subject to Federal regulation, and that the only change that legislation made in the Interstate Commerce Act was the provision requiring notice to the designated agency and consent to its intervention. These requirements were complied with in each of these four section 13 cases (R. 92). Under *I. C. C.* v. *Jersey City, supra,* the weight of the Price Administrator's contentions is for the Commission, not the court. As demonstrated by its report in this case, the Commission gave full consideration to the contentions of the Price Administrator, and recognized its duty to consider the anti-inflation legislation. The Commission considered the Price Administrator's contention to the effect that to raise the subnormal intrastate fare of 1.65 cents to the 2.2-cent level prevailing interstate throughout the country and intrastate in 44 of the 48 states, in order to remove undue prejudice and unjust discrimination against interstate commerce, would be inconsistent with the wartime stabilization program, and, as shown by its ultimate findings, overruled the contention, citing its report in *Increases in Texas Rates, Fares and Charges,* 253 I. C. C. 723, dealing with section 13 situations precisely similar in principle to the present cases. The last-mentioned report is cited with approval in *I. C. C.* v. *Jersey City,* 322 U. S., pp. 520–521, footnote 8. The effect of the Commission's de-

cisions in the *Texas* case and in the present case is that an increase in intrastate fares in a particular state or states to the level prevailing generally on interstate commerce throughout the country and on intrastate traffic in most of the states of the Union does no violence to the purpose of the price control and stabilization program. It is significant that in its latest report in *Ex Parte 148*, 259 I. C. C. 159, 189, the Commission found that, "Nothing in the record shows that the 10 percent increase in passenger fares has had any inflationary effect."

ARGUMENT

I

The order, requiring removal of discriminations against interstate passengers and interstate commerce, is within the authority conferred by section 13 of the Interstate Commerce Act

Section 13 (3) specifically authorizes carriers by railroad subject to the Act to file a petition with the Commission bringing in issue any rate or fare "made or imposed by authority of any state,"[5] and authorizes the Commission to institute an investigation upon such petition. Paragraph 4 declares unlawful any such rate or fare which unduly or unjustly discriminates either against interstate shippers, passengers, or localities or against inter-

[5] There is no dispute that the intrastate coach fare of 1.65 cents was imposed by State authority. Cf. *Florida v. U. S.*, 282 U. S. 194, 209–210.

state commerce; and it directs that whenever, in any such investigation, the Commission, after full hearing, finds that either of the forbidden discriminations exist, it "shall" prescribe the rate or fare which will, in its judgment, remove the discrimination.

These provisions, added by Transportation Act, 1920, first came under review in *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, 257 U. S. 563 (1922) in which, in an opinion by Chief Justice Taft, they were interpreted and their constitutionality sustained. It was held that the principles laid down in the *Minnesota Rate Cases*, 230 U. S. 352, 432, 433, in the *Shreveport* case, 234 U. S. 342, 351, and in the analogous cited cases, left no room for discussion of the constitutionality of section 13.

The order there reviewed, like the present order, required the increase of intrastate passenger fares to the interstate level previously fixed as reasonable. The Court fully sustained the Commission's authority under section 13 to remove undue discrimination against travellers in interstate commerce caused by the lower intrastate rates, but was unable to find that the evidence relating to discrimination of that character was sufficiently comprehensive in scope to support the Commission's state-wide order. It rested its decision, sustaining the order, upon the Commission's finding of unjust discrimination against

interstate commerce resulting from the revenue losses caused by the low intrastate fares. The Court overruled the contention that the words "unjust discrimination against interstate commerce," as used in section 13, meant only discrimination as between persons and localities. It held that those words were not tautological of the preceding words forbidding undue preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and that they "aptly include a kind of discrimination against interstate commerce which the operation of" the Transportation Act, 1920 "for the first time makes important and which would seriously obstruct its chief purpose" to develop and maintain an adequate national railway transportation service. Thus, the *Wisconsin* decision recognizes that the Commission is authorized by section 13 to remove either unjust discrimination against interstate commerce resulting from intrastate revenue losses or undue prejudice against interstate shippers or travellers. Subsequent decisions make it clear that a valid finding of either of these kinds of discrimination is sufficient to support a corrective order.

In *Florida* v. *United States*, 282 U. S. 194, the Court, through Chief Justice Hughes, held that in the exercise of its power to authorize the Interstate Commerce Commission to establish intra-

state rates in order to remove unjust discrimination against interstate commerce, "the Congress has given to the Commission authority not only to remove an undue prejudice against persons or localities, but to establish a state-wide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute." Differentiating the two types of discrimination, the decision explains that, "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenues, the question is that of the relation of rates to income" (*Ib.*, 214).

In the second decision in the *Florida* case, 292 U. S. 1, 5, Chief Justice Hughes pointed out that in the *Wisconsin* case the Court reached the conclusion that the provision of section 13 (4) for the removal of "any undue, unreasonable, or unjust discrimination against interstate commerce" was not to be regarded as referring only to discrimination as between persons and localities. "We held that Transportation Act, 1920, imposed an affirmative duty on the Commission 'to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States.' Intrastate rates, we said,

must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an 'unjust discrimination against interstate commerce.'" This was said in sustaining an order which required increases in intrastate log rates throughout the State of Florida so as to bring them up to the reasonable interstate level, based solely upon a finding of revenue discrimination. The opinion states (pp. 3–4) that the Commission "found that the * * * intrastate rates caused unjust discrimination against interstate commerce from a revenue standpoint," but "made no finding with respect to undue prejudice against persons and localities in interstate commerce." See also the opinions of Mr. Chief Justice Stone in *United States* v. *Louisiana*, 290 U. S. 70, and *Illinois Comm.* v. *U. S.*, 292 U. S. 474, 482, and the opinion of Mr. Justice Brandeis in *Georgia Commission* v. *United States*, 283 U. S. 765, 773.

In *Ohio* v. *United States*, 292 U. S. 498, in which the Commission had found both types of discrimination, this Court, speaking through Mr. Justice Roberts, said:

> The District Court held the order justified by reason of undue preference and

prejudice, but did not pass upon the lawfulness of the Commission's action in respect of revenue discrimination. We hold the decision of the court was right and we need not discuss the argument presented as to revenue burden (pp. 501–502).

In *Illinois Commission* v. *Thomson*, 318 U. S. 675, Mr. Chief Justice Stone said that "It has long been established that the Interstate Commerce Commission, under section 13 (4) of the Act has power to supersede an intrastate rate by prescribing in its stead a new rate which the Commission finds necessary to remove undue or unreasonable prejudice to interstate commerce resulting from the maintenance of the intrastate rate" (P. 682). And it was there pointed out that "the Commission alone is authorized to wield the constitutional power to set aside state-established intrastate rates by prescribing intrastate rates itself * * *."

In view of the above cited decisions, and others sustaining section 13 orders, including *New York* v. *United States*, 257 U. S. 591; *Louisiana Commission* v. *United States*, 284 U. S. 125, and *Mississippi* v. *United States*, 307 U. S. 610, it is hardly open to question that an order such as the one here involved, supported by findings of both types of discrimination forbidden by section 13, is within the Commission's authority, and that a valid finding of either of these types of discrim-

ination will sustain such an order. See also *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118–120, and *Wickard* v. *Filburn*, 317 U. S. 111, 118–129.

II

The order is supported by substantial evidence showing the existence throughout the State of both types of discrimination forbidden by Section 13

Appellants allege that neither the Commission's order nor five of the six major findings upon which it rests are supported by the evidence (R. 576–7). The finding (No. 2, R. 95) that the intrastate fares in North Carolina are lower than the corresponding fares applicable interstate and intrastate generally throughout southern territory, except in North Carolina, Alabama, Kentucky, and Tennessee, is not attacked. Evidence was first submitted by the carriers, who, though technically respondents, were in fact complainants, and they assumed the burden of proving the allegations of their petition. Then the North Carolina Commission introduced evidence, and, finally, evidence was submitted by the Office of Price Administration. Fifteen witnesses testified (R. 151–295), and introduced 21 exhibits (R. 295–408A). Certain other documents were incorporated into the record by reference (R. 145–148) or by stipulation at the oral argument (R. 410–411). Some of the evidence supporting the five challenged findings is here stated.

Reasonableness of interstate fares

The evidence bearing on the reasonableness of the coach fare of 2.2 cents, made effective on interstate traffic throughout the South on October 1, 1942, showed, among other things, that this fare is substantially lower than that which prevailed in that territory and generally throughout the country for 25 years prior to the inauguration in the South of the experimental coach fare of 1.5 cents on December 1, 1933:

For ten years prior to World War I the fares were generally 2.5 cents a mile. On June 10, 1918, while the railroads were under Federal control, the 2.5-cent fare was increased to 3 cents by order of the Director General of Railroads. Effective August 26, 1920, the 3-cent fare was increased to 3.6 cents, under the authorization of *Increased Rates, 1920, supra.* The 2.5-cent fare was 13.6% higher than the 2.2-cent fare; the 3-cent fare was 36.4% higher, and the 3.6-cent fare, which remained in effect in southern territory for 13 years, was 63.6% higher (R. 71–74; 295–300).

There was also evidence showing changes in conditions subsequent to the Commission's finding in 1936 that fares of 2 cents in coaches would be reasonable, which tended, independently of the evidence and findings in *Ex Parte 148,* to support the reasonableness of the increase in that fare to 2.2 cents. It was shown that large expenditures had been made by the carriers in remodeling and

air-conditioning passenger equipment (R. 79, 302–303); that expenses had increased because of the expansion in the volume of passenger traffic (R. 153, 158, 164, 174, 305); that unusual expenses had resulted from wartime operations, including expedited movement of troop trains (R. 79–80, 153, 159–161, 302, 303), and that there had been recent increases in wages (R. 159, 163–164, 211, 332), in the cost of materials and supplies (R. 80, 159, 211, 332), and in taxes (R. 80–81, 210–211, 330–331). Deficits from passenger operations in the years 1936–1942 were also shown (R. 76–78, 202–203, 318).

The most cogent of the evidence on this subject, however, is that showing that coach fares on the 2.2-cent basis were contemporaneously in effect on interstate traffic throughout the country and on intrastate traffic in 44 states, and that these fares had been previously found by the Commission to be reasonable. (R. 82, 94, 298, 299, 300) Cf. *Louis. & Nash. R. Co.* v. *U. S.*, 238 U. S 1, 15–16.

The previous finding of the reasonableness of these fares were made in *Passenger Fares and Surcharges, supra,* and in the first and second reports in *Ex Parte 148.* As stated above, after a comprehensive investigation of passenger fares throughout the country, the Commission found in *Passenger Fares and Surcharges* that fares of 3 cents in Pullmans and 2 cents in coaches would be reasonable for the future and prescribed these

fares as maxima. It did not prescribe them as minima, hence the railroads were at liberty to initiate or maintain lower fares, and the Commission found that the voluntarily established experimental coach fare of 1.5 cents then in effect in southern territory was not unreasonable or otherwise unlawful. It did not require the southern carriers to raise that fare, though it did find that 2 cents per mile was a reasonable basic coach fare for application on railroads generally throughout the country, including the southern lines. (R. 73; 214 I. C. C., 256). In its report in the case at bar the Commission characterized the 1.5-cent fare as "a *subnormal* fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles" (R. 74). [Italics supplied.]

In its original order in *Ex Parte 148*, as previously shown, the Commission found that a Nation-wide increase of 10% in fares was necessary to enable the carriers to continue to render adequate and efficient transportation service during the national emergency, and that the proposed increased fares would be reasonable and otherwise lawful.

This latter finding, coupled with the finding in *Passenger Fares and Surcharges* that 2 cents was a reasonable basic coach fare for application generally, including southern territory, constituted a finding that 2.2 cents would be a reasonable coach fare in the South. (Hence, the

Commission's order of August 1, 1942 (R. 524), which authorized the southern carriers to apply the increase of 10% approved in *Ex Parte 148* to a basic fare of 2 cents, did nothing more than to permit those carriers to increase their subnormal fare to the normal basis.)

After the *Ex Parte 148* increases had been in effect for a little over a year, the Commission, upon the petition of the Price Administrator and others, reopened the proceeding and, on April 6, 1943, after extensive further hearings, issued a supplemental report, 255 I. C. C. 357, in which it again considered the reasonableness of the passenger fares throughout the country.[6] This report, like the original report, surveyed the revenue needs of the interstate railway transportation system of the country in time of war. In respect of the freight rate increases, ranging up to 6%, the Commission found that the added revenue was not necessary or justified under the conditions then prevailing, p. 394, and it suspended the previous authorization as to freight rate increases until December 31, 1943. Regarding passenger fares, it found the situation to be different in important respects, and stated (p 394):

> * * * As we have previously shown [pp. 385–389] the evidence herein discloses

[6] As in the case of the original report, this supplemental report is devoted largely to the more important subject of freight rates. Reference to passenger revenues and fares will be found on pp. 367–368, 385–388, and 394–395.

that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated * * *

Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare plus the surcharges that became effective in that year. Interstate coach fares on the present basis of 2.2 cents per mile are 26 percent lower than the 3-cent level prevailing interstate during and before World War I * * *

Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel * * *

It concluded and found that no modification of the previous findings respecting the interstate standard (as distinguished from commutation) passenger fares was necessary (P. 395). The

report noted that on October 1, 1942, the basic coach fare on most of the southern roads was increased from 1.5 cents to the maximum of 2 cents found reasonable in *Passenger Fares and Surcharges, supra,* plus the 10% increase, and that "This change in fare had the effect of placing the interstate standard one-way fares in Pullman cars and coaches on the same general level on all class I railroads of the country, namely, 3.3 and 2.2 cents per mile, respectively" (P. 386).

In *Georgia Comm.* v. *United States,* 283 U. S. 765, 769–770, the Court, in overruling the contention that no full hearing had been held because the Commission limited the section 13 hearing to the question of prejudice and discrimination and refused to consider anew the question of the reasonableness of the interstate rates, held that the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings and that no evidence was offered at the supplemental hearing to show that conditions had so changed since the interstate rates were prescribed as to require reconsideration of the issue.

In the present case, unlike the *Georgia* case, the Commission did consider anew the reasonableness of the interstate rates, and it found that conditions had not materially changed since its last preceding finding of the reasonableness of the 2.2-cent interstate coach fare. The present inter-

state fares, one-way and round-trip, the Commission said, "are either the equivalent of, or are less than, the maximum basic fares found reasonable in *Passenger Fares and Surcharges, supra,* plus the 10 percent increase authorized in *Ex Parte No. 148.* These one-way fares are now in effect on interstate and intrastate traffic throughout the entire country, except intrastate in these four States * * *" In is concluding discussion it said that "The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in *Ex Parte No. 148* [255 I. C. C. 357] wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 percent for the duration of the war, is reasonable for general application" (R. 94).[7]

[7] The actual fares are in many instances lower than these basic fares. As explained in the last report in *Ex Parte 148*, 259 I. C. C. at p. 194, the standard or basic rate of fare is influenced by reductions in round-trip fares, by the application of direct line fares over circuitous routes, and by special reduced fares of 1.25 cents a mile maintained for furloughed and discharged personnel of the armed forces. See R. 81. The revenues per passenger-mile were 1.90, 1.87, 2.00, and 1.93 cents for 1940, 1941, 1942, and 1943, respectively (259 I. C. C. 194).

After adverting to the well-settled rule that the most helpful evidence in determining the reasonableness of rates and fares is comparison with other rates or fares for like services, the Commission concluded that "The record does not warrant any modification of our conclusion in the report on further hearing in Ex Parte No. 148 with respect to the passenger fares of these respondents." (R. 82).

This evidence and much more which appears in the record seems ample to support the Commission's ultimate finding (R. 95) that the present interstate fares in question "are just and reasonable."

Similarity of transportation conditions and undue preference and prejudice

Substantial evidence supports the findings that the conditions affecting the transportation of passengers in coaches intrastate within North Carolina and interstate to, from, and through North Carolina are substantially similar, that the interstate passengers travel in the same trains and generally in the same cars with the intrastate passengers but are forced to pay higher fares than the latter for like services, that thereby the intrastate passengers are unduly preferred and the interstate passengers are unduly prejudiced, and that this undue preference and prejudice is state-wide in scope.

It is not disputed that the basic intrastate coach fare in North Carolina of 1.65 cents per mile applied throughout the state. Hence, on all intrastate journeys within the state the coach passengers paid at this rate. Nor is it disputed that the basic fare for interstate journeys in southern territory was contemporaneously 2.2 cents a mile. Hence, all interstate passengers from points in North Carolina to points in other states, from points in other states to points in North Carolina, from another state to another through North Carolina, and between points in North Carolina, paid at the rate of 2.2 cents a mile.[8]

Numerous illustrations of this difference in fares were given.[9] One, which is typical, shows that an interstate passenger from Gastonia, N. C., to Atlanta, Ga., 238 miles, would pay a fare of $5.24; while a passenger travelling wholly in North Carolina from Gastonia to Goldsboro, 245 miles, would pay $3.90 or $1.34 less than the interstate passenger for practically the same distance (R. 172).

[8] Interstate passengers between points within the state are those destined to points in other states or from points in other states to points in North Carolina between which no through fare is in effect and the applicable fare is a combination to and from some intermediate point in North Carolina.

[9] See testimony of Barry (R. 175), Lynch (R. 184–189), Makinson (R. 235–243), and Beuchler (R. 180–184), and their exhibits 3, 4, 7, 8, and 13 (R. 309, 312, 314, 383). It was testified that such examples could be multiplied indefinitely (R. 175).

There is nothing in the physical operating conditions in North Carolina as compared with those in the surrounding states of Virginia, South Carolina, Georgia, and Tennessee which would warrant this difference in fares, for the physical operating conditions in North Carolina are substantially the same as those in the adjoining states. Indeed, such conditions by and large are substantially uniform throughout southern territory. This is true also as to other conditions affecting passenger transportation (R. 161, 173, 176).

Nor was this difference in fare justified by differences in the service accorded, for the evidence shows that the interstate and intrastate passengers were transported on the same trains and were accorded similar service. A brief portion of this evidence is here stated.

The Southern Railway System, 7,200 miles, operates in the District of Columbia, and in nine southern states, including 1,202 miles in North Carolina (R. 152). Its line from Washington to Atlanta and beyond extends across North Carolina. On this line it operates 16 trains daily (8 in each direction). Some of these are through trains, which make only a limited number of stops, but each makes at least six stops in North Carolina, usually at Greensboro, High Point, Spencer, Salisbury, Charlotte, and Gastonia. Others are local trains that stop at every station. All these

trains carry interstate passengers, e. g., from Washington to Charlotte or Atlanta, or from Danville, Va., to Spartanburg, S. C., and also North Carolina intrastate passengers, e. g., in the case of a through train, from Greensboro to Gastonia, or, in the case of a local, between any two points in North Carolina. The Southern operates numerous other trains through and in North Carolina over its various lines. In some instances these trains cross state lines, as, for example, the trains between Spartanburg, S. C., and Asheville, N. C.; in other instances the run is wholly within North Carolina, e. g., the train between Winston-Salem and Wilkesboro, but in either event they carry both interstate and intrastate passengers (R. 155, 156, 161, 174).

In the operation of trains into, out of, across, and within North Carolina, the Southern gives no consideration to state lines. On none of its trains is any distinction made between interstate and intrastate passengers. Both classes of passengers travel in the same cars and coaches, baggage is handled in the same baggage car, and the trains are operated by the same crews, irrespective of the interstate or intrastate nature of the passenger travel, and all trains are operated under the same general supervision (R. 154–155). The Southern does not operate any trains whatever in North Carolina solely for intrastate passengers. Within the knowledge of the Southern's

general superintendent of transportation, who has had 35 years' experience with the Southern, there is no instance of a wholly intrastate passenger train operation on the system in North Carolina (R. 155).

This is true of the lines of other rail carriers operating in North Carolina. In the long experience of this general officer he has frequently been in contact with the operating officials of other roads and his knowledge is sufficient for him to say that there is a similar commingling of interstate and intrastate passengers on the trains of other roads in North Carolina (R. 157). Another general official of the Southern (Barry) testified that no distinction whatever is made in the handling of interstate and North Carolina intrastate passengers (R. 173).

This comprehensive testimony, which was not controverted, was suplemented by numerous examples of interstate and North Carolina intrastate passengers traveling on the same train and one paying a higher fare than the other for similar accommodations. Of the many, one relates to train No. 9 of the Seaboard Air Line Railway. The Seaboard operates 4,184 miles of road in Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, 630 of which are in North Carolina (R. 236). Its line from Richmond, Va., to Florida, traverses North Carolina, passing through Henderson, Raleigh, and Hamlet, N. C.

Another line extends from Hamlet to Atlanta and Birmingham. Train No. 9, operating from Richmond to Birmingham, carries interstate passengers, e. g., from Henderson, N. C., to Chester, S. C., and also intrastate passengers, e. g., from Henderson to Monroe, N. C. The intrastate fare from Henderson to Monroe, 193 miles, at 1.65 cents a mile, is $3.25; the interstate fare from Henderson to Chester, S. C., 238 miles, at 2.2 cents a mile, is $5.28. The interstate and intrastate passengers travel on the same train and are furnished the same accommodations. The interstate passenger pays $4.29 for that portion of his journey between Henderson and Monroe; the intrastate passenger between those points pays $3.25, a difference of $1.04 in his favor for the same distance (R. 238; Ex. 13, R. 383).

Other evidence shows similar instances on the Atlantic Coast Line. This line, 5,000 miles long, operates in Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, with 1,000 miles in North Carolina (R. 184). Its main line extends from Richmond, Va., to points in Florida (R. 185). Its trains 80 and 89 between Richmond and Florence, S. C., carry interstate passengers, e. g., from Virginia to North Carolina, and also intrastate passengers between points in North Carolina. An interstate passenger from Fayetteville, N. C., to Florence, S. C., 82.8 miles, pays a fare of $1.83, at 2.2 cents a mile. An intrastate

passenger on either of the same trains from Weldon, N. C., to Smithfield, N. C., 82.8 miles—precisely the same distance as from Fayetteville, N. C., to Florence, S. C.—at 1.65 cents a mile, would pay $1.45 (R. 188, 314).

This evidence seems ample to sustain the Commission's finding of the state-wide character of the preference and prejudice. In weighing it the Commission could properly ascribe significance to the total absence of evidence to the contrary by the local authorities, and to the admission by State Commissioner Hunter that it is generally true that interstate and intrastate passengers are handled under the same conditions on the same trains (R. 254).

Appellants, not disputing the state-wide character of the preference and prejudice, attempted to justify the difference in fares by evidence showing inferior service on certain main-line and branch-line local trains in the state and comparing the equipment and service on those trains with that afforded by certain through streamlined trains (R. 258-279). Examples were given of overcrowding and untidiness of the coaches on the local trains. But whatever the character of the service on the latter trains, the evidence shows it was accorded to interstate and intrastate passengers alike (R. 269, 278, 400). "Admittedly," the Commission stated in its report; "interstate as well as intrastate passengers may and do travel

on the local and mixed trains in North Carolina described above, and the accommodations and service furnished interstate passengers in such instances are the same as the accommodations and service furnished intrastate passengers" (R. 91).

Three of the railroads serving North Carolina, the Southern, the Seaboard, and the Atlantic Coast Line operate a limited number of modern streamlined air-conditioned coach trains.[10] On these trains seats are reserved without charge in addition to the regular coach fare (R. 178, 289). The facilities and service of these trains are available to North Carolina intrastate passengers as well as interstate passengers to or from North Carolina or passing through North Carolina (R. 303, 267). The interstate passengers on these trains pay a fare of 2.2 cents a mile. On the same trains the intrastate passengers between points in North Carolina paid 1.65 cents (R. 303). The "Southerner" (Nos. 47 and 48) makes regu-

[10] The operation of these trains is a matter of common knowledge. The Southern Railway's "Southerner" operates from New York to New Orleans. The Atlantic Coast Line's "Champion" and the Seaboard's "Silver Meteor" each operate in two sections, one to the east coast, the other to the west coast, of Florida. The "Tennessean" of the Southern Ry., from Washington to Memphis, via Lynchburg, Bristol, and Chattanooga, carrying streamlined reserved-seat coaches and also Pullman sleeping cars, does not pass through any portion of North Carolina. The Southern's "Crescent Limited" between New York and New Orleans, is not a streamliner; it is an all-Pullman train between Washington and Atlanta.

lar scheduled stops at Greensboro, High Point, Spencer, Salisbury, Charlotte and Gastonia."[1] It picks up passengers at any of these six points in North Carolina and lets them off at any of the other points (R. 177). The Southern reserves seats on these trains for intrastate passengers between any of these North Carolina points (R. 176–177). There was no proof of a restriction against the use of these streamlined coach trains by North Carolina intrastate passengers. The record shows affirmatively that they are available to those passengers to the same extent that they are available to interstate passengers, subject to the condition that seats must be reserved in advance (R. 289–290), and to the limitation that they stop at only the larger stations (R. 90).

As well stated by Circuit Judge Parker, "intrastate passenger travel on the streamlined trains and interstate passengers travel on the branch lines. The great bulk of passenger traffic is not carried either on the streamlined trains or on the branch lines but on the ordinary passenger trains on the main lines; but, wherever they travel, the interstate coach passengers ride side by side with the intrastate passengers and enjoy the same accommodations." (Opinion below, R. 567–8.)

The evidence, comprehensive and typical in character, was ample to support the Commission's

[1] These two trains, one in each direction daily, are included in the 16 Southern Ry. trains referred to above as operating between Washington and southern points.

finding of similarity of interstate and intrastate transportation conditions and of undue preference and prejudice as between interstate and intrastate passengers on all trains operated in North Carolina. Cf. *Georgia Comm. v. United States,* 283 U. S. 765, 774; *New England Divisions Case,* 261 U. S. 184, 197–199; *United States* v. *Louisiana,* 290 U. S. 70, 75, 76.

If, however, notwithstanding the uncontroverted evidence of the state-wide character of the undue preference and prejudice and the Commission's finding to that effect, it should develop that there are isolated intrastate fares which are not related to interstate fares in such a way as to violate section 13 (4), the saving clause in the Commission's report would then come into play. This clause (R. 96) provides that the findings are "without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act." (Cf. *Wisconsin R. Comm.* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563, 591; *Georgia Comm.* v. *United States,* 283 U. S. 765, 772.)

Unjust discrimination against interstate commerce resulting from revenue losses

As stated in the Commission's report, evidence was submitted of audits made for various periods

by the principal respondents in each of the four proceedings which indicated that the amount of additional revenue which the respondents would have received during those periods had the intrastate fares been upon the interstate level exceeded $558,000 per annum in North Carolina, and $750,000 per annum in Alabama, $526,000 per annum in Kentucky, and $556,000 in Tennessee (R. 86). The evidence in this regard as to North Carolina will be found in the testimony of the general statistician of the Southern Railway (R. 202) and his Exhibit No. 9 (R. 317). Responsible officials of the respondents expressed the view that an increase in the intrastate fares to the interstate level under existing conditions would not result in any important loss of traffic to other forms of transportation and would produce increased revenues substantially equivalent to those estimated by them (R. 87, 170–171). There is little doubt that the evidence supports the finding that the revenue losses due to the lower intrastate fares would be at least $525,000 in North Carolina.

The evidence further indicated that the intrastate fares could be used to defeat or break down the interstate fares, and thereby reduce the revenues on interstate traffic (R. 86, 172–173; 185–187; 238–240, 301, 306–308, 313, 383). Passengers destined to points outside the State could purchase intrastate tickets to points near the State line and either rebuy tickets or pay cash fare on the train for the remainder of the journey (R.

86). Of the many concrete examples given, the following is typical. The interstate coach fare between Raleigh, N. C., and Knoxville, Tenn., over the Southern is $8.91; the intrastate coach fare from Raleigh to Hot Springs, N. C., is $5.25, and that from Hot Springs to Knoxville is $2.05. By purchasing an intrastate ticket from Raleigh to Hot Springs and either purchasing a ticket at Hot Springs or paying cash for the remainder of the journey, a passenger traveling from Raleigh to Knoxville could thus save $1.61 (R. 86, 306).

The losses resulting from resort to this device were not computed separately and are included in the loss of $525,000 per annum which the Commission found would result from the continued maintenance of the 1.65-cent intrastate fare in North Carolina.[11]

The evidence of record, some of which has been related above, amply supports the Commission's ultimate findings and in turn gives full

[11] In *New York* v. *United States*, 257 U. S. 591, 599, the opinion by Chief Justice Taft noticed that "There was evidence * * * to show that at Buffalo and other border points the difference between the interstate and intrastate fares would divert business from the interstate lines between New York City and Buffalo to the New York Central Lines [which lines between these points were wholly within the State] and that the same difference would break up interstate journeys to the west into intrastate journeys to Buffalo from New York and an interstate journey beyond, thus reducing interstate travel and discriminating against passengers carried therein."

support to the concluding finding of the existence, State-wide in scope, of both types of discrimination forbidden by section 13.

The contention that the findings are not supported by substantial evidence seems but to invite the Court to weigh the evidence, resolve such conflicts as appear in it in favor of the appellants, and reach a judgment upon it contrary to the Commission's. But, as held many times, conflicts in the testimony, the credibility of witnesses, and the weight of the evidence are for the administrative body. *Warehouse Co.* v. *United States*, 283 U. S. 501, 508; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *Labor Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–597; *Board of Trade* v. *United States*, 314 U. S. 534, 546; *Florida* v. *United States*, 292 U. S. 1, 12.

The Commission did not err in considering past deficits from passenger traffic

In its report in the present case the Commission observed it had found in the report on further hearing in *Ex Parte 148*, 155 I. C. C. 357 (April 6, 1943) that passenger traffic had failed for many years to pay its proper share of railway expenses, and that only with a large volume of passenger traffic was the 1942 passenger deficit currently eliminated as to most of the railroads; and that the respondents in the present case had presented statistics of their revenues, expenses,

and income, together with other data designed to support that finding as to them (R. 75).

These statistics show that each of six respondents—the Louisville & Nashville, the Atlantic Coast Line, the Clinchfield, the Norfolk Southern, the Seaboard, and the Southern—sustained substantial deficits in their passenger business for each of the six years 1936–1941 [13] (R. 76). It was not until after the increased fares and increased passenger traffic of 1942 that any of these roads earned an income from this part of their business. Even then two of the roads, the Clinchfield and the Norfolk Southern, suffered passenger deficits (R. 76).[14] The aggregate passenger deficits of these roads for the years 1936–1941 were as follows (R. 318):

Year	*Deficit*
1936	$16,426,832
1937	16,119,576
1938	19,473,445
1939	18,869,064
1940	19,363,851
1941	8,351,784
Cumulative deficits 1936–1941	98,604,552

[13] The segregation of the figures for the passenger service was made in accordance with the formula worked out by the Commission and used on and after January 1, 1936. Separate figures for the passenger traffic are not available prior to that date. Segregated figures covering passenger service of the other respondents, which are small railroads, were not available.

[14] The North Carolina commission authorized these two roads to increase their intrastate passenger fares to the interstate level of 2.2 cents (R. 27).

For 1942 the income or deficit of each road from passenger traffic was as follows (R. 318):

Atlantic Coast Line, Income	$4,446,553
Clinchfield, *Deficit*	84,990
Louisville & Nashville, Income	2,069,686
Norfolk Southern, *Deficit*	134,600
Seaboard, Income	10,654,634
Southern, Income	9,748,714

The average annual passenger deficit of these roads for the seven-year period 1936–1942 was $10,272,080 (R. 318). Of this sum the deficit of the Louisville & Nashville was $4,848,548 (R. 318). This was eliminated in the calculations appearing in the Commission's report because this road has only 13 miles of track in North Carolina—a branch extending from Murphy, about 130 miles southwest of Asheville, to the Georgia State line (R. 165, 321). With the deficit of this road eliminated, the report shows the deficits of the remaining five in No. 29036 to be as follows (R. 76):

1936, deficit	$10,907,768
1937, deficit	10,231,812
1938, deficit	12,916,490
1939, deficit	12,464,628
1940, deficit	12,548,190
1941, deficit	3,436,130
1942, income	24,630,302
Average, deficit	5,423,532

Appellants, referring to these figures, contend the order should be set aside "on the ground that the Commission had no power to order increases of North Carolina intrastate coach fares in order to compensate for passenger service deficits incurred

during prior years * * *" (R. 579, 589). But the Commission did no such thing; from its report it is obvious it required the increases of the intrastate fares in order to remove discriminations found to violate section 13. The evidence showing deficits over a period of years had a bearing on the reasonableness of the interstate fares, and was entitled to be considered by the Commission along with all other relevant data bearing upon that subject. Appellants' sole reliance in this regard is the holding in *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, 590, that "regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." But there is nothing in that decision which prevents the Interstate Commerce Commission, in the exercise of its authority to establish just and reasonable rates, from considering carrier revenues over a period of years. Nor is there anything in the present provisions of the Interstate Commerce Act that precludes net revenues from rising, during a period of heavy traffic, above a fair return. As shown in a subsequent chapter, the Commission is authorized to consider earnings over a period of years, and is not required to cut down

rates when, during a temporary period of heavy traffic, the revenues rise to or even above a fair return.

The evidence established that the intrastate fare, in its relation to the interstate fare found reasonable by the Commission, was unreasonably low. The allegation of the North Carolina appellants of lack of substantial evidence that the intrastate fares were unreasonably low (R. 589) puts from view the voluminous evidence bearing upon this subject as reflected in the Commission's report and summarized in part above. In a case involving discriminations in violation of section 13 growing out of a disparity between related intrastate and interstate rates, the Commission must determine, as held in *Georgia Comm.* v. *United States*, 283 U. S. 765, 770, "whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level." Here, the Commission found upon substantial evidence that the 2.2-cent interstate fare is reasonable and that the transportation conditions affecting the related intrastate and interstate fares are substantially similar. There were other findings with adequate evidentiary support covering all the essential elements of a section 13 violation. These findings established that the intrastate fare of 1.65 cents, in its relation to the reasonable interstate fare for similar service, was unreasonably low. Upon finding that it contravened the provisions of

section 13, the Commission was authorized to raise it to the reasonable interstate level. Cf. *Shreveport Case, supra,* and see in this connection *infra,* pp. 94–97. A similar objection was overruled in the opinion of Mr. Chief Justice Stone in *Illinois Comm.* v. *U. S.,* 292 U. S. 474, 483. It was there objected that there was no finding that the intrastate rates, before they were ordered increased, were less than maximum reasonable rates. In rejecting this contention the opinion stated (p. 483):

> It is plain from the nature of the inquiry that the rate level, to which both classes of traffic [intrastate and interstate] were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. * * *

Evidence that the intrastate fare was noncompensatory was not necessary. A contention that there must be evidence to establish this fact is to assert that no intrastate rate can violate section 13 (4) unless it is noncompensatory even though it causes undue prejudice or unjust discrimination

against interstate commerce. Adoption of such a principle would atrophy section 13 (4). A state rate may be above the cost of the service but yet be unduly low in its relation to comparable reasonable interstate rates and may, therefore, be found to cause the forbidden prejudice and discrimination. A finding that the intrastate rate is below the cost of the service is not essential under section 13. In *Florida* v. *United States,* 292 U. S. 1, such a showing was made in order to emphasize the aggravated character of the discrimination, but in most, if not all; other section 13 cases approved by this Court there has been no such showing. In *Louisiana* v. *United States,* 284 U. S. 125, lack of cost evidence was urged without avail. Undue prejudice and discrimination against interstate commerce is not condoned by the possibility that the intrastate rate may be compensatory. The question is, not whether it is compensatory but whether it causes the forbidden discriminations.

The Commission's report and order negative the possibility that a passenger fare of 1.65 cents is now within the zone of reasonableness. The Price Administrator suggests, brief p. 45, that the fare of 1.65 cents per mile may be within the zone of reasonableness. This suggestion overlooks that in *Passenger Fares and Surcharges, supra,* the general finding of the Commission was that coach fares of 2 cents a mile throughout the country

were reasonable. This finding was couched in the following language (214 I. C. C. 256):

> The regular passenger fare structure of respondents [all common carriers by railroad subject to the Act, see 214 I. C. C., p. 175, indisputably including lines in southern territory] is * * * unreasonable in violation of section 1 and in contravention of section 15a * * * to the extent that it exceeds * * * 2 cents per passenger mile * * * in coaches. * * * without prejudice to the maintenance of lower fares in coaches * * * in any one or more of the major districts of the country * * *

The report in that proceeding refers to the fare of 1.5 cents then in effect in southern territory and makes it clear that this fare was put in experimentally to determine whether it would recapture some of the lost passenger business, and the Commission did not require that this fare be increased to the reasonable basis of 2 cents a mile, although under the report and order the southern carriers were at liberty to do so if they so desired.

Subsequently, by virtue of orders in *Ex Parte 148*, the 1.5-cent fare became 2.2 cents. In its report in the present case, the Commission said:

> Having found in *Passenger Fares and Surcharges, supra,* that 2 cents per mile was a reasonable basic coach fare for appli-

> cation on railroads generally throughout the country, including the lines of petitioners [carriers in southern territory], we authorized petitioners by our order of August 1, 1942, to apply the increase of 10 percent approved in Ex Parte No. 148 to a basic fare of 2 cents per mile, and modified accordingly the original order in the latter proceeding (R. 73).

Its Finding No. 1 was that the interstate fare of 2.2 cents is just and reasonable (R. 95). Earlier in the report it found:

> The 1.5-cent fare in effect [in southern territory] from December 1, 1933, to November 14, 1937, and from January 15, 1939, to February 9, 1942, was a *subnormal* fare maintained primarily to attract traffic that had been diverted chiefly to private automobiles (R. 74). [Italics supplied.]

Conditions have radically changed since the 1936 report in *Passenger Fares and Surcharges, supra,* and the need of maintaining a low fare in order to attract passenger traffic no longer obtains. Now, for the first time in many years, passenger traffic carried at reasonable fares is able to pay its own way. As stated in the report in the present case (R. 75), economic conditions since the report in 1936 in *Passenger Fares and Surcharges, supra,* "have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage

unnecessary travel * * *" It was not until the appearance of the large volume of passenger traffic in 1942, and until after the fares had been increased, however, that the passenger deficit was eliminated (R. 75).

In view of these changes in conditions, of the facts found in the Commission's report, and of the Commission's explicit finding that fares of 2 cents increased by 10 percent are just and reasonable, and of the Commission's order requiring these intrastate fares to be increased from 1.65 cents to 2.2 cents, there is no room to suppose that the Commission now considers a fare of 1.65 cents to be within a zone of reasonableness.

Section 13, authorizing petition by carriers, does not require complaint by individuals

Notwithstanding the presence of substantial evidence adequately supporting the Commission's findings of discriminations of both kinds forbidden by section 13 (4), appellants claim it is insufficient because of absence of testimony by individual passengers that the disparity between the state and interstate fares operated to their disadvantage or injury; and it is contended that because of this absence or of a complaint by interstate passengers the Commission was without authority to make the order. The authority conferred by section 13 (4) may be exercised whenever it is found, after full hearing, in a proceeding initiated upon the petition of the carriers concerned, that

any intrastate fare causes the prejudice or discrimination there forbidden. Section 13 (3) explicitly authorizes the filing of such petition by the carriers. No petition, complaint, or evidence by any one else is required. By these provisions, carriers subject to the Act are permitted to show that their intrastate fares, imposed by state authority, cause undue prejudice against interstate passengers, as well as unjust discrimination against interstate commerce. In this respect, section 13 is different from section 3 (1), and its purpose is different. Section 3 (1) provides protection for individuals, localities, etc., against undue prejudice practiced by the carriers, while section 13 affords a means of relief for carriers against unduly low rates or fares imposed upon them by state authority. Neither this Court nor the Commission has held that the high purpose of section 13 (4) depends upon the presence of evidence by individuals complaining of undue prejudice where the evidence actually submitted, as in the present case, plainly shows the existence of such prejudice and the resulting injury.

III

The Commission accorded the North Carolina Commission a full hearing

It is not disputed that a hearing was held for the taking of evidence at Raleigh, N. C., December 28–29, 1943 (R. 143–409), that the North

Carolina commission appeared and presented evidence (R. 247–279); that subsequently briefs were filed by the parties, including the North Carolina commission (R. 70), and that later oral argument of the issues, including argument by counsel for the North Carolina commission, was submitted at Washington before the Commission.[*] The North Carolina commission, though not denying these facts, contends that it was denied a full hearing on seven grounds (Brief, pp. 129 et seq.).

1. The first is that the Commission's order of August 1, 1942 (R. 524–5), authorizing the carriers in southern territory to increase their coach fares to 2.2 cents, as requested in their petition of July 14, 1942, was made without hearing, evidence, or report. But as stated in the order itself, no reply or protest to the carriers' petition was lodged with the Commission. No statutory provision requires a hearing upon a petition of that nature; the lack of the necessity or desirability of a hearing was indicated by the absence of protests against the proposed step. Further, as set out in the order itself, "a basic coach fare of 2 cents per mile was approved by the Commission for application prior to Ex Parte No. 148 on railroads generally throughout the

[*] An excerpt from the oral argument before the Commission displaying stipulation of counsel, appears at R. 410–411. A full transcript of the argument, and copies of the briefs before the Commission, are before the Court as original exhibits.

country, including the lines of said petitioners; that a general increase of 10 percent was authorized to be made in all passenger fares in Ex Parte No. 148, for the reasons set forth in the report therein, *supra*; and that a basic coach fare of 2.2 cents per mile is now maintained on Class I railroads generally throughout the country, with the exception of the aforesaid petitioners." Appellant's charge of arbitrariness in this respect seems groundless.

2. After the tariffs publishing the increased coach fares of 2.2 cents in southern territory had been filed with the Commission, bearing an effective date of October 1, 1942 (pursuant to the authorization of the Commission's order of August 1, 1942), the Federal Price Administrator requested the Commission to enter upon an investigation of the fares and in the meantime to suspend their operation, under section 15 (7) of the Act. The Commission declined to do so (R. 73). The North Carolina Commission contends (brief, 130) that the Commission's refusal to exercise, at the request of the Price Administrator, its discretionary power in this regard, without hearing, evidence, or report was arbitrary. Section 15, par. 7 (reproduced on pp. 196–197 of North Carolina's brief) does not require or contemplate hearings on the question whether the suspension power shall be exercised. After the filing of the protest, the carriers are

usually given an opportunity to reply, and the Commission then determines whether the facts and circumstances justify a suspension. The short time available for the determination does not permit of formal hearings. As the statute leaves the question of suspension to the Commission's discretion, and does not contemplate a formal hearing for the taking of evidence on the question, the Commission's refusal to suspend the schedules referred to, without such a hearing, was not arbitrary.

3. The third count is that on October 11, 1943—two days prior to the institution of this proceeding on October 13, 1943—the Commission denied a petition (R. 384–387) filed July 8, 1943, by the North Carolina commission requesting the institution of an investigation, upon the Commission's own motion, into the reasonableness of the interstate coach fares of 2.2 cents in southern territory. But, as shown above, pp. 42–45, the Commission had recently conducted three general investigations into the reasonableness of passenger fares throughout the country and had found coach fares of 2.2 cents to be reasonable and lawful for general application. *Passenger Fares and Surcharges, supra* (1936), *Ex Parte 148*, 248 I. C. C. 545 (1942), and on rehearing, 255 I. C. C. 357 (1943). For these reasons the Commission saw no necessity of undertaking a further general investigation into the reasonable-

ness of the passenger fares in the South. The appellants' contention here is not that the Commission exceeded its discretion in refusing to do so, but that the refusal operated to deprive it of a full hearing in the subsequently instituted section 13 proceeding. It seems obvious it could not have had that effect.

4. This point brings before this Court an alleged error, not of the Commission, but of the Commission's examiner. It is claimed that a ruling by the examiner precluded the production by the State commission of evidence bearing on the reasonableness of the interstate coach fares. Counsel for the State commission inquired, before the taking of evidence began, whether his understanding was correct that the reasonableness of the interstate coach fares was not in issue (R. 150). The examiner responded—"Well, it is before the Commission to the extent that it is a burden resting upon respondents to establish that present interstate fares are not in excess of maximum reasonable fares. That is my understanding. Otherwise, it is not in issue. It is not subject to attack, and the parties are at liberty to show what facts they have and they [their] position on that particular question" (R. 150). This was merely a preliminary statement by the examiner of his understanding. It was not a ruling upon the proffer of any evidence by the State commission. Even if it had been a definite

adverse ruling upon the proffer of specific evidence, it would not have been final and would not necessarily have precluded the receipt of the evidence. For, in case of an alleged error by an examiner in rejecting proffered evidence, the proper procedure of course is to apply to the Commission for the issuance of appropriate instructions to the examiner. No such action was taken by the North Carolina commission, and it is not shown that it complained to the Commission at any later stage of the proceeding because of the examiner's statement. It made no protest at the time (R. 150). Nor is it shown that any specific evidence offered by the North Carolina commission was rejected during the course of the hearing. The latter part of the examiner's statement, that the parties were at liberty to show what facts they had bearing on the question of the reasonableness of the interstate fares and their position on that particular question, indicated that any evidence relevant to the question proffered by the State commission would be received. Thus, the contention that a ruling by the examiner deprived the State commission of a full hearing is clearly unmeritorious factually. But we think it should be rejected on the ground that no complaint was made to the Commission because of the alleged ruling and that complaint to the court for the first time, asking for review of action of the Commission's examiner rather

than that of the Commission, is not permissible. Cf. *U. S.* v. *Ill. Cent. R. Co.*, 291 U. S. 457, 465; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 311.

5. The examiner announced, at the close of the hearing, that no proposed report would be issued (R. 295). No objection to this announcement was then interposed by North Carolina counsel, nor, so far as the record shows, was objection subsequently made to the Commission. Examiner's proposed reports are often issued in proceedings before the Commission, but where there has been a hearing for the taking of evidence, submission of briefs, and oral argument, as in this case, it would not appear that the issuance of an examiner's proposed report is essential in order to comply with a statutory provision requiring a "full hearing." Many times proposed reports are waived. Here the absence of objection to the examiner's announcement that no proposed report would be issued was clearly tantamount to such a waiver. We suggest that the objection now made should be overruled on the ground that no objection was interposed at the time of the examiner's announcement and none was thereafter lodged with the Commission.

6. The sixth ground is that the examiner ruled that reply briefs would not be permitted (R. 295). No complaint was made to the Commission because of this ruling. Oral argument was subse-

quently had, in which the parties had full opportunity to reply to each other's arguments then submitted orally as well as those previously submitted in briefs.

7. Finally, it is complained that the Commission denied North Carolina's petition for further hearing. The petition was filed shortly after the taking of the testimony and made no showing of substantial changes in conditions in the meantime. Under section 17 (6) of the Interstate Commerce Act, "Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear. * * *" The Commission did not exceed its discretion in denying the petition for rehearing. *U. S.* v. *Northern Pacific Ry.*, 288 U. S. 490; *Atchison, T. & S. F. Ry. Co.* v. *U. S.*, 284 U. S. 248; *I. C. C.* v. *Jersey City*, 322 U. S. 503, 513–519.

The Commission accorded the state authorities a full hearing; their contention to the contrary seems to be without merit.

IV

The court below properly held that evidence *de novo* was not admissible.

When this case came on for hearing before the court below, petitioners offered a certified copy of the evidence before the Commission and certain other documents from the Commission's record, which were received without objection. They also

offered several documents which had not been put before the Commission and of course had not been considered by the Commission. Objection was interposed by counsel for the Commission to the receipt of all such new evidence (R. 114–120). The court received these documents tentatively, subject to its further ruling, and in its opinion it ruled against their receipt, saying: "We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its competency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered." (R. 572.)

This ruling is assigned as error. Decisions of this Court have established beyond peradventure that the validity of administrative orders is to be determined by the evidence before the administrative tribunal and not by evidence introduced for the first time in court. If the rule were otherwise, "the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." *U. S. v. Louis. & Nash. R. R.*, 235 U. S. 314, 321; *Louis. & Nash. R. R. v. U. S.*, 245 U. S.

463; *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 227; *Tagg Bros.* v. *U. S.*, 280 U. S. 420, 443–445; *Louisiana & Pac. Ry.* v. *U. S.*, 209 F. 244, 252. Compare *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, 362–369.

It is clearly indicated in *Florida* v. *United States*, 292 U. S. 1, that a section 13 case is not an exception to the rule. Speaking through Chief Justice Hughes, the Court said that "The authority conferred upon the Commission by section 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body." *Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Wisconsin R. Comm.* v. *C., B. & Q. R. Co.*, *supra*. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *U. S.* v. *Louisville & Nashville*

R. Co., 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission [citing numerous cases]."

In excluding the proffered new evidence the court below did not err.

The evidence so excluded has been put before this Court. Some parts of it appear in the printed transcript, other parts have been omitted from printing under a stipulation of counsel which permits either side to refer to it in brief or in argument (R. 595–6), but such reference to this evidence would, of course, be futile if the Court holds that is was properly excluded by the court below. It consists of the following documents.

1. Affidavit of Frank A. Dowling, tendered in paragraph 156 of the North Carolina petition, and attached to that petition as Appendix 156.1 (R. 28), and same affidavit as amended (R. 517), introduced at the hearing before the court below (R. 117).

These affidavits contain figures taken from the annual reports submitted to the Commission by

various carriers for the years 1942 and 1943, but these reports were not introduced in evidence before the Commission. At the time of the hearing in December 1943 the annual reports for the year 1943 had not been compiled. Various exhibits containing data taken from the 1942 and earlier annual reports of the carriers concerned were introduced (cf., e. g., R. 318, 320, 321, 322), but the reports themselves were not introduced, nor were the data contained in these affidavits. Not having been introduced as evidence, these reports were not, and could not properly have been, considered by the Commission. In *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288, it was held that the Commission may not take judicial notice of data contained in the annual reports of the carriers on file with it for the purpose of using such data in the decision of a proceeding before it. The affidavits in question did not consist merely of computations from evidence before the Commission; they contained computations from the annual reports which were not in evidence by stipulation or otherwise. The affidavits themselves were not of record before the Commission; they were offered for the first time in the court below, contained facts and figures not in evidence before the Commission, and were clearly *de novo*.

2. Affidavit of Doris S. Whitnack, economist, Office of Price Administration (R. 54). This affidavit contains computations from data taken

exclusively from the annual reports of 11 southern railroads to the Commission for the year *1943*. No annual reports for 1943 were introduced in evidence at the Commission hearing and no data taken from them was introduced, as the reports for 1943 were not then in existence. Nor was there any stipulation that the Commission might consider these annual reports, when filed. This affidavit was clearly *de novo*.

3. Photostatic copies of parts of the annual reports of various southern carriers to the Commission for the year *1943*. (These documents are lodged in the Clerk's office and are not printed as part of the transcript.) This material was tendered for the first time to the court below (R. 115, 116). It was contended that these annual reports, when filed, were to be incorporated into the record by reference under stipulation of counsel entered into during the course of the argument before the Commission (R. 115). But that stipulation covered, not annual or other reports of the individual carriers to the Commission, but monthly statistical reports compiled by the Commission. (Copies of these monthly compilations were proffered below, were received without objection (R. 118), and are here as original exhibits, not printed as part of transcript.)

4. Photostatic copies of monthly reports of Analyses of Passenger Traffic for the month of December in 1937–1943 submitted to the Commis-

sion by six southern carriers (not incorporated in the transcript). These reports were not of evidence before the Commission either physically or by stipulation. There is no doubt they were *de novo*.

5. Monthly statistical reports issued by the Commission after its decision in this case (not incorporated in transcript). As indicated above, counsel for all parties stipulated at the oral argument before the Commission, that the Commission might use "the monthly reports of the Bureau of Statistics" for the purpose of the proceedings then under argument (R. 411). The Commission used such reports covering the months up to and including December 1943 in reaching its decision. It did not use subsequent reports, for, at the time of its decision, March 25, 1944, the latest of such reports then compiled was for December 1943. (See report, R. 78.) As stated above, counsel for appellants introduced in the court below certified copies of these reports up to and including December 1943, without objection (R. 118). They also proffered copies of such reports for the subsequent months of January, February, and March, 1944, which were objected to (R. 119). These reports could hardly be deemed within the scope of the stipulation; they were not considered by the Commission in reaching its decision, and were therefore clearly inadmissible under the rule excluding evidence *de novo*.

6. Copy of request made by the North Carolina commission upon the railroads for certain additional data for use in the proceeding before that Commission upon the petition of the railroads for authority to increase their intrastate coach fares to the interstate level (R. 510). Certified copy of this request, proffered in the court below, was objected to because of irrelevancy and also because it is not a part of the record of evidence before the Interstate Commerce Commission (R. 116). The order of the Interstate Commerce Commission could not be shown to be invalid by reference to such a request by the North Carolina commission; manifestly, therefore, this evidence was irrelevant. But it was excluded by the court below on the ground that it was not a part of the evidence before the Interstate Commerce Commission. It was properly excluded under the *de novo* rule.

7. Affidavits of J. S. Tassin (R. 526–529) and L. L. Oliver (R. 530–544). These affidavits were introduced in the court below by counsel for the carriers (R. 120), but were submitted for consideration only in the event that the plaintiffs' *de novo* evidence was admitted (R. 120). The latter evidence having been excluded, these affidavits, which are admittedly *de novo*, should also be considered as excluded.

V

The Commission's finding of unjust discrimination against interstate commerce, resulting from the failure of the intrastate traffic to contribute its fair share of the revenues required for maintenance of adequate and efficient transportation service, is not invalid on the alleged ground that the earnings of the carriers from all their traffic have recently risen to a level deemed by appellants to be in excess of a fair return

The Price Administrator challenges the validity of the Commission's finding that an unjust discrimination against interstate commerce had resulted from the lower intrastate fares required by the state commissions. His assignment of error (R. 587) makes no reference to the finding of undue preference of intrastate passengers and undue prejudice to interstate passengers; and his brief, in expressly disavowing attack upon that finding (p. 23), concedes want of concern on his part in undue preference and prejudice, as such, between interstate and intrastate passengers. But, under the authorities previously cited, pp. 33–38, the finding of undue preference and prejudice is sufficient, if valid, in and of itself, to support the order independently of the finding of unjust revenue discrimination. Thus, the Court may find it to be unnecessary to pass upon the Price Administrator's contentions or any of the contentions of the other appellants having relation solely to this particular finding.

The Price Administrator argues (brief, pp. 18–19) that the criterion of undue revenue dis-

crimination against interstate commerce, as established by decisions of this Court, is the sufficiency of the contribution made by the intrastate rates or fares to the revenue required by the railroads to enable them to maintain adequate and efficient transportation service; that a proper application of this criterion requires the Commission to determine (1) whether the railroad revenues are greater or less than the amount actually required for adequate and efficient transportation service, (2) whether the intrastate fares enable the intrastate traffic to make a sufficient contribution to the amount of required revenues; that this criterion could not be satisfied by the determination made by the Commission that the interstate fares were reasonable and that the lower intrastate fares were charged for substantially the same service; that neither of these determinations is incompatible with "determinations" (made by the Price Administrator and not ~~by the Commission~~) that the railroad revenues were in fact higher than actually required and that the intrastate fares did make a sufficient contribution to the revenues which in fact were required; that it is evident therefor, that the Commission did not properly apply the controlling criterion in reaching its basic fifth finding [that the carriers' revenues under the lower intrastate fares were less by the substantial amounts stated than they would be if those fares

were increased to the level of the corresponding interstate fares, and that "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service" (R. 95–96)]; that the Commission could not properly have determined, on the evidence of record, that the then prevailing level of railroad revenues was no higher than that required to enable the railroads to render adequate and efficient transportation service, but, on the contrary, the level of revenues was then yielding a rate of return in excess of the rate needed to sustain such service.

The argument, according to our understanding of it, intends to assert that the aggregate revenues of the carriers from all their traffic, freight and passenger, interstate and intrastate, are, at this particular time, sufficient to enable the carriers to render adequate and efficient transportation service, and that, therefore, the failure of a particular kind of intrastate traffic to bear its fair proportionate share of the needed over-all revenues is to be condoned, and the Commission lacked power to increase the intrastate fares to the reasonable interstate level of fares for similar transportation service. The argument urges, in effect, that the controlling criterion is not whether the particular intrastate traffic is contributing its fair proportionate share of the needed over-all

revenues, but whether the aggregate of all traffic has already contributed enough for that purpose.

But in a section 13 case, the question is not whether the entire traffic of the railroads involved is earning enough, but whether the particular intrastate traffic is contributing its share. The decision in the *Wisconsin* case and other decisions of this Court make it clear that intrastate traffic is not contributing its fair share of the revenue where the corresponding interstate rates have been found by the Commission to be reasonable, where the intrastate rates are lower than such reasonable interstate rates, where the transportation conditions affecting the interstate and intrastate traffic are substantially similar, and where increase of the intrastate rates will result in increased revenues.

Under these decisions and subsequent amendments to the Interstate Commerce Act, failure of intrastate traffic to contribute its fair share of the revenues needed for maintenance of adequate and efficient transportation service may be found by the Commission to be an unjust discrimination against interstate commerce whether the general earnings of the carriers are low or, during a temporary period of extraordinary traffic volume, are above normal. "Congress in its control of its interstate commerce system," it was said in the *Wisconsin* case, "is seeking in the Transportation Act to make the system adequate to the needs of

the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work * * *".

Intrastate rates and the income from them, the Court said, must play a most important part in maintaining an adequate national railway system. This was demonstrated by the fact that 20% of the gross freight receipts of the railroads of the country were then from intrastate traffic, and 50% of the passenger receipts, the ratio of the gross intrastate revenue to the interstate revenue being a little less than one to three. "If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less."

At the time of the decision, the original section 15a (41 Stat. 456, 488), providing for a fair percentage return upon value, was still in force; and the Court, referring to that provision, said that "If the railways are to earn a fixed net percentage

of income, the lower the intrastate rates, the higher the interstate rates may have to be." It is equally true that if, as the present section 15a contemplates, the railways are to earn sufficient revenues to provide adequate and efficient railway transportation service, the lower the intrastate rates, the higher the interstate rates may have to be. And the following holding of the *Wisconsin* case is fully cogent under the present law: "The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, § 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of § 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by

directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

In *Florida* v. *United States*, 292 U. S. 1 (1934), the effect of the amendment of section 15a upon the authority of the Commission under section 13 (4) to remove an unjust discrimination against interstate commerce caused by a disparity of intrastate rates viewed from a revenue standpoint, was considered, and it was held that the amendment did not disrupt the "dovetail relation" between section 15a and section 13 (4). "The authority conferred by section 13 (4) to prescribe intrastate rates for the purpose of removing an unjust discrimination against interstate commerce was not withdrawn," the Court said. "The Congress had knowledge of the construction given to section 13 (4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose."

These decisions lend no support to appellants' contention that intrastate traffic may avoid contributing its fair proportionate share of the needed over-all revenue when the general revenues have arisen above a certain level. On the con-

trary, they clearly recognize that where the intrastate traffic does not bear its fair share of the general burden, there is unevitably a discrimination against interstate commerce whether the general revenue of the carriers from all their traffic are high or low. For, to repeat the language of the *Wisconsin* case, "The effective operation of the Act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system." In *Illinois Comm. v. United States*, 292 U. S. 474, sustaining a section 13 order requiring removal of unjust revenue discrimination only, the general financial condition of the carriers involved was not considered at all; and the following expression of Mr. Chief Justice Stone (p. 485), speaking for the Court, is not restricted to times of low general revenues:

> The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate, is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried * * * under substantially the same conditions.

State traffic is not relieved of the obligation to bear its fair proportionate share of the needed revenues merely because the aggregate traffic, despite the losses from low intrastate rates, is yielding a fairly good return. If the various state commissions could refuse to bring intrastate

rates up to the reasonable interstate level or could require reductions in intrastate rates below that level, on the ground that the interstate transportation system is earning what might be deemed by the state commissions to be more than a fair return, the result might be, if Federal authority were impotent to prevent it, the reduction of the general revenues of the carriers as a whole to such an extent as to require a general increase in interstate rates or fares or to prevent a general reduction in interstate rates or fares.

In *Colorado* v. *United States*, 271 U. S. 153, sustaining a certificate of the Commission authorizing an interstate carrier to abandon the operation of an intrastate branch as to intrastate commerce, on the ground that the branch was operated at a loss and thereby cast a burden on interstate commerce, the Court said, p. 163:

> Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken

> the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates.

The Court pointed out that "The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318."

As the operation of an intrastate branch in intrastate commerce at a loss may prejudice interstate commerce by compelling the carrier to raise reasonable interstate rates or to abstain from making an appropriate reduction of such rates, so prejudice to interstate commerce may be effected by intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, and compel the carriers to raise reasonable interstate rates or to abstain from making an appropriate reduction of such rates. Compare *Texas* v. *United States*, 292 U. S. 522, 530, 531.

This Court has not held that section 13 is oper-

ative only during times of general revenue deficiencies. Its decisions have construed the section as requiring that the intrastate traffic of the country, which constitutes an important part of the entire traffic, shall bear its fair proportionate share of the revenues needed to maintain an adequate railway system and that its fair proportionate share is that contributed by rates found by the Commission to be reasonable and sufficient to yield revenue meeting the tests of section 15a and the National Transportation Policy. Further, it is inevitable that if the state commissions were vested with power to refuse to authorize increases in intrastate rates to the level of reasonable interstate rates on the ground of lack of need of additional revenues or were empowered to reduce intrastate rates because in their opinion the general revenues from all traffic were too high, it would follow that the 48 states and not the Interstate Commerce Commission could set the revenue standard.

As previously observed, the Price Administrator challenges only the finding of unjust revenue discrimination. It is important to observe in this connection that, wholly aside from the finding of unjust revenue discrimination, an identical increase in carrier revenue would result from the finding of undue preference and prejudice as between persons. Upon finding that an intrastate rate results in either type of discrimination for-

bidden by section 13 (4), the Commission must then determine what rate or rates it shall prescribe to remove the discrimination. Removal of the discrimination is accomplished by requiring parity between the state and interstate rates. Obviously such parity can be attained by reducing the interstate rate to the level of the intrastate, or raising the intrastate to the level of the interstate, or by reducing one and raising the other to some common intermediate level. Cf. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. Should the Commission find, as here, that the interstate rate is reasonable and that the circumstances and conditions surrounding the interstate and intrastate traffic are substantially the same, then, to reduce the interstate rate would be to require a rate below a reasonable level. But, as held in the *Shreveport* case (234 U. S., at p. 355), it is clear that, "in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates."

The order of the Commission involved in the *Shreveport* case, which was prior to the enactment of section 13 (3) and (4), was made under section 3 (1). The Commission found and prescribed

reasonable interstate rates, found that the related intrastate rates were lower and caused a discrimination against interstate shippers, and entered an order requiring the carriers to remove the discrimination. The opinion of this Court, pp. 349–350, stated that manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. It was urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was that the order relieved the carriers from further obligation to observe the intrastate rates, required by state authority, and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. In sustaining this holding, this Court said, p. 359, "In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement." The order in the present case requires, among other things, that the carriers cease and desist from practicing the undue prejudice and preference found in the

report to exist (R. 507). Under this part of the order, aside from the finding of unjust revenue discrimination, the carriers are entitled to disregard state regulations and to raise their intrastate fares to the level of the interstate fares found reasonable by the Commission, and thereby, under this part of the order alone, secure the additional revenue.

The Price Administrator's assertion (brief, p. 18) that "the railroad revenues were in fact higher than actually required" is without suport. The brief speaks of "determinations" to this effect, but there has been no such determination by the Commission. The determinations referred to appear to be those made in the Price Administrator's brief, pp. 29–36. By dubious calculations the brief reaches the conclusion that the rate of return of the carriers respondent in the four section 13 cases, before the payment of Federal income taxes, is higher than a fair return and that, "Clearly, therefore, the railroads were earning more than the revenues required by law." The fallacy of the argument lies in its assumption that the law sets "fair return" as the inexorable peak above which railway income shall never rise. It overlooks that the "fair return" method of rate making was repealed in 1933 along with the provision for recapture of excess earnings, and that the new standard leaves it to the administrative judgment of the Commission, unfettered

by rigid rules, to prescribe rates to yield sufficient revenue to enable the carriers to provide adequate and efficient railway transportation service. This new standard is by no means the same as the old "fair return" rule; on the contrary, it differs from it in highly important respects.

The Price Administrator's contentions would limit railway income, during the temporary period of heavy war traffic carried efficiently by the railroad system, to some indefinite level deemed to be a fair return, presumably 5¾%, notwithstanding previous deficits which reappeared for many years, precipitating nearly one-third of the mileage of the country into the hands of trustees in bankruptcy,[16] and in total disregard of the need of funds for railroad debt reduction, for new and modern equipment, for post-war rehabilitation and other purposes, and would restore the most objectionable feature of the old section 15a. That section, as is well known, was originally enacted in Transportation Act, 1920, as one of the many provisions looking to the development and maintenance of adequate national transportation service, *Wisconsin* case, *supra; New England Divisions Case,* 261 U. S. 184; *United States* v. *Louisiana,* 290 U. S. 70, 73–75; *Texas* v. *United States,* 292 U. S. 522, 530; *I. C. C.* v. *Jersey City,* 322 U. S.

[16] 1938 *Annual Report*, I. C. C., p. 2: "At the present time, railroad companies operating about 31% of the total mileage are in bankruptcy or receiveirship * * *"

503, 522–523; *United States v. Penna. R. Co.*, — U. S. — (Seatrain case), decided January 29, 1945. Its rule of rate making directed the Commission to adjust rates so that the carriers of the country, as a whole or in rate groups, would, under efficient management, etc., earn an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway transportation property. The Commission was authorized to determine what percentage of the aggregate value would constitute a fair return, subject to the proviso that for two years beginning March 1, 1920, it should not exceed 6%.[17] The recapture clause provided that any carrier which earned in excess of 6% should pay one-half of the excess to the Commission for the maintenance of a general railroad contingent fund and should keep the other half in a reserve fund. Cf. *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456 (1924), sustaining the constitutionality of the recapture clause.

In its annual reports to Congress for 1930, 1931, and 1932, the Commission recommended, for the reasons stated therein, that the rule of rate making be amended and the recapture clause repealed.[18]

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[17] In *Reduced Rates, 1922*, 68 I. C. C. 676, 679–683, 734, the Commission determined that on and after March 1, 1922, the fair return would be 5¾%.

[18] See pp. 86–90, 1930 report; pp. 107–110, 1931 report, and also Appendix G thereof, pp. 347–367; pp. 16–18, 1932 report.

The objection to the original rule of rate making, to use the language of the *Fifteen Percent Case 1931,* 178 I. C. C. 539, 581, was that it cherished "elusive hopes that by mere changes in rates railroad earnings can be made stable regardless of business conditions." As explained in the 1931 report, p. 109, "This would mean lowering rates in times of prosperity, when traffic is heavy, and raising them in times of depression when traffic is light, directly counter to the normal trend of prices." The substitute which the Commission proposed for the rate-making rule contained "recognition of the principle that inasmuch as railroad earnings must inevitably fall below normal in times of depression, since railroad traffic reflects business conditions very closely, they may properly be permitted to rise above normal in times of prosperity."

The 1932 report emphasized that the recapture provisions as they then stood made no allowance for fluctuations in earnings. "If a carrier is fortunate enough to have excess income in any year, half of that excess is subject to recapture, regardless of the fact that it may be completely offset by deficiencies in succeeding years. This was the most serious defect in the recapture logic * * *"

It had been suggested, the Commission stated, p. 17, that the defect in the recapture theory could be cured by making the period, then a single year,

long enough to cover fairly peaks of prosperity and valleys of depression. "But who can say, under present conditions, how long such a period should be? The strongest argument in favor of retaining recapture in some form is the fact that there are a comparatively few railroads which have enjoyed extraordinary prosperity in the past and have even maintained relatively good earnings down to the present time. Aside from the fact that there is no telling how long such carriers will remain exceptions, in view of the continual change in industrial conditions and probable railroad consolidations, we doubt the wisdom of devising a recapture rule to cover such situations. There are other means of dealing with them. Nor is it at all certain that it is a bad thing for the country that some railroads should be able to earn more than ordinarily generous returns, in view of the hazards to railroad earnings which have become so clearly manifest in the light of recent events. The opportunity to earn more than ordinary profits in exceptional cases is an inducement, when such hazards exist, to investment which might not otherwise be made."

The Commission expressed the view therefore "that section 15a should be remodeled to fit the conditions which actually beset the railroad industry, instead of the theoretical conditions which were assumed when its present provisions were made law." It renewed its recommendation that

the recapture provisions should be repealed, stating that their repeal would remove one dark cloud which hung over the credit of the railroads, and that "the removal will benefit rather than harm the country." It also renewed its recommendations that the rule of rate making be superseded by a simple rule which would "make it clear that in regulating the general level of rates we shall always keep in mind and be guided by the need for producing, so far as possible, revenues which are sufficient for the maintenance of an adequate national transportation system, and also recognize the principle that the railroads may justly earn a surplus in times of prosperity to offset deficiencies in times of depression."

By Emergency Railroad Transportation Act, 1933, c. 220, 49 Stat. 211, 220, section 15a was amended to read as it now appears.[19] The recapture clause was eliminated and a simple rule of rate making substituted for the group method.[20] The new section 15a, which has remained since 1933 without further substantial amendment, clearly does not limit the carriers, either as a group or individually, to any particular return. Instead, the Commission is directed, in prescrib-

[19] Except for a slight amendment made by Transportation Act 1940 (54 Stat. 898, 912).

[20] Cf. House Rept. No. 193, 73d Cong., 1st Sess., and Sen. Rept. No. 87, 73d Cong., 1st Sess., on S. 1580, Emergency Railroad Transportation Act, 1933; also *Florida* v. *United States*, 292 U. S. 1, 5–8.

ing rates, to give due consideration, among other factors, "to the effect of rates on the movement of traffic"; "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service"; and "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service." And by the National Transportation Policy, adopted in Transportation Act, 1940 (54 Stat. 899; 49 U. S. C., preceding section 1), all the provisions of the Act are to be administered and enforced with a view to attaining, among other important objectives, the development and preservation of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense.

By these provisions the responsibility of determining the revenue needs of the interstate railway transportation system of the country has been placed by Congress upon the Commission. This responsibility must be performed in times of peace and, more imperatively, in time of war by the single body, authorized to act for the nation, unimpeded by divergent views of local authorities or even of other federal agencies not charged with similar responsibility.

The Commission has performed this duty. At the beginning of the war, following the threat of a railway strike and the granting of wage increases,

and after a general survey of transportation conditions, it authorized general increases in freight rates and an increase of 10% in passenger fares. *Ex Parte 148*, 248 I. C. C. 545. A year later, after a phenomenal expansion in the volume of traffic and a sharp rise in revenues, it suspended the freight rate increases until December 31, 1943, but allowed the passenger fare increase to stand. 255 I. C. C. 357. It found:

> We find that, under present conditions, and, so far as we can reasonably foresee, for the remainder of 1943, the revenues received by the railroads, if their freight rates and charges be reduced by the amounts resulting from our previous authorizations of increases in this proceeding will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof (255 I. C. C., 393–4).

In November, 1943, the Commission again examined the subject. It found that current carrier revenues would "meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof." It again suspended the previously authorized freight rate increases until June 30, 1944, but allowed the passenger fare increase to continue (256 I. C. C. 502).

Six months later, after another examination, and upon similar findings, it suspended the freight

rate increases until the end of 1944, but did not disturb the 10% passenger fare increase. 258 I. C. C. 455. This report and the one immediately preceding it were predicated upon consideration of current statistical data and returns to show-cause orders.

In the Fall of 1944 further extensive hearings were held in *Ex Parte 148* and voluminous additional evidence taken. On December 12, 1944, a further report was issued, 259 I. C. C. 159, in which the subject was again exhaustively considered in the light of present conditions. The National Association of Railroad and Utilities Commissioners, the Federal Price Administrator, and others urged that the suspended freight rate increases, and also the 10% increase in passenger fares, should be canceled. The carriers opposed such cancellation, and asked that the suspended freight rate increases be allowed to go back into effect. For the reasons stated in its comprehensive report, the Commission concluded that the freight rate increases should again be suspended, tentatively until the end of the year 1945, and that no change should be made in the passenger fares. The report fully explores the financial condition of the railroads, considers their past and present earnings, and forecasts, as far as present conditions permit, their revenues and revenue needs in the immediate future.

The ultimate finding as to freight rates was as follows:

> We find that, under present conditions, and, so far as we can reasonably foresee, for the period from January 1 to December 31, 1945, both inclusive, the revenues received by the railroads, if their freight rates and charges, including those on milk and cream whether transported in passenger or freight trains, are left substantially on their present level without the addition of the increases originally permitted in this proceeding, will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) of the act, and will be reasonable and just (*Ib.*, 193).

Respecting passenger fares the finding was:

> We find that no modification of our previous findings, orders, and authorizations respecting passenger fares is warranted (*Ib.*, 194).

The report also stated:

> Our duties under the national transportation policy of Congress and under the other provisions of the Interstate Commerce Act are continuous. In view of the uncertainties as to the factors that may affect the traffic and revenues of the respondents during the period of further suspension herein required, any party to these proceedings may petition us if cir-

cumstances and conditions affecting such traffic and revenues substantially change (*Ib.*, 195).

In view of these findings, made in successive reports at short intervals during the war period, in which the Commission has carefully inquired into the revenues of the carriers and has found that the present rates and fares which produce those revenues are just and reasonable and meet the standards of the Interstate Commerce Act and the National Transportation Policy, the contention of the appellants that the aggregate revenues of the carriers are excessive would seem to be wholly without merit. Indeed, it is questionable whether the contention is at all permissible in this case, as it is in the nature of a collateral attack upon the action in *Ex Parte 148*, which has not been directly challenged in judicial proceedings.

Rates of return of the carriers involved not unduly high measured by the abandoned standard of fair return under previous section 15a

In the preceding section, we have endeavored to show that the failure of intrastate traffic to bear its fair proportionate share of the required overall revenues, caused by unduly low intrastate rates, is a discrimination against interstate commerce no less real when the general revenues are fairly good than when they are low. This section is devoted chiefly to a showing, for the information of the Court (though we do not believe it is

of legal significance in this case), that the rates of return of the carriers involved are not unduly high even when measured by the fair return determined under the previous law.

As stated in the Commission's report (R. 76), the Price Administrator "submitted evidence intended to show that, on their combined freight and passenger operations for the 12 months ended October 31, 1943, these seven respondents are earning before Federal income taxes more than a fair return on various book investment bases computed by his witness, and are not in need of the additional revenue which the proposed increased intrastate fares are expected to produce." After consideration of this and other evidence of record, the Commission found *inter alia* that the interstate fares are just and reasonable, that the lower intrastate fares were not contributing their fair share of the revenues necessary for adequate and efficient transportation service, and that such lower fares caused unjust discrimination against interstate commerce.

In his brief before this Court the Price Administrator relies upon the evidence referred to (R. 282–284 and Exhibit No. 20, R. 408A) in support of his contention that the rates of return are excessive. The exhibit considers only the recent period of 12 months ending with October 1943. (At the time of the hearing in December 1943 the latest available statistical reports were for Octo-

ber 1943.) The exhibit purported to calculate rates of return during this period for seven of the carriers serving North Carolina: Atlantic Coast Line; Clinchfield; Louisville & Nashville; Norfolk & Western; Norfolk Southern; Seaboard Air Line; Southern. Three different methods were used, in each of which the rate of return was ascertained by computing the relation of "net railway operating income *before* Federal income taxes" to various figures purporting to reflect the carriers' investment in transportation property as of December 31, 1942. The basic figures were taken from the carriers' annual and monthly reports to the Commission, but the reports themselves were not introduced. The forms of these reports were prescribed by the Commission, and they call for the use of figures appearing in the carriers' accounts, which accounts are required to be kept in accordance with the uniform system of accounts prescribed by the Commission. Neither the accounts nor the reports call for computation of "net railway operating income before Federal income taxes." Schedule 300, I of the annual report form, "Income Account for the Year," requires that "Net railway operating income" shall be computed by deducting from gross railway operating revenues first, railway operating expenses, then railway tax accruals, including all Federal income taxes, and then adding or sub-

tracting the net income or deficit from equipment rents and joint-facility rents. The exhibit computed "net railway operating income before Federal income taxes" by adding Federal income taxes to the net railway operating income, and it reaches results that are plainly erroneous. It shows, for instance, a rate of return for the Clinchfield, figured one way, as 70.5%, and, figured in other ways, as 45.5% and 8.2%. It overlooked the fact that the Clinchfield is under lease to and is operated jointly by the Louisville & Nashville and the Atlantic Coast Line.[21] The return of 8.2% was based on an investment of nearly $69 million. The return of 70.5% was based upon an investment of $3 million. The $69 million is the lessor's investment in its line of railroad, 308 miles (R. 321), and the $3 million is merely the investment of the lessees in equipment used on the line.

With the erroneous figure of 70.5% for the Clinchfield entering into the computations, the exhibit arrived at an average rate of return for the seven roads of 18.3%, before Federal income taxes. Using the returns of 8.2% and 45.5% for the Clinchfield, which appear also to be erroneous, the average rates of return before Federal income taxes, were shown as 14.7% and 18%. The exhibit failed to show the amounts of the Federal income taxes paid by the several roads.

[21] This lease was approved in *Clinchfield Railway Lease*, 90 I. C. C. 113 (1924), subject to certain conditions sustained in *Atlantic Coast Line R. Co.* v. *United States*, 284 U. S. 288.

Other evidence shows, however, that the taxes paid by the Class I railways in the Southern Region averaged $49,488,617 annually during the period 1924–1942; that these taxes rose from $37 million in 1936 to $76 million in 1941 and to $194 million in 1942 (R. 319). For the 11 respondent carriers, taxes were $21 million in 1936 and $126 million in 1942 (R. 330).

Whether Federal income or excess profits taxes should be deducted from operating expenses in computing rates of return might be deemed an open question, and where it is appropriately presented (as in a confiscation case) it might be an important one. Cf. *Galveston Elec. Co.* v. *City of Galveston*, 258 U. S. 388; *Georgia Ry. & Power Co.* v. *Railroad Com. of Georgia*, 262 U. S. 625. It does not appear to be necessary to determine the question in this case. It may be observed, however, that determination of the true rate of return requires consideration of what is left after the taxes are paid. This is illustrated by the figure given in the exhibit as the "Net railway operating income before Federal income taxes" for the Atlantic Coast Line, viz, $61,336,000. The "Net railway operating income" of the Atlantic Coast Line in 1943 was $15,705,000.[22] The difference between this figure and $61,336,000 indicates

[22] Shown in *Statement No. 150* of the Commission's Bureau of Transport Economics and Statistics for December 1943 (part of the record before the Com. by stipulation, R. 411, and before this Court as an original exhibit).

roughly the amount of the Federal income tax—about $45 million. The rates of return of this carrier are given in the exhibit as 19.1%, 22.1%, and 22.2%, before Federal income taxes, whereas the rate after the payment of these taxes, i. e., the relation of the actual net railway operating income in 1943, $15,705,000, to the depreciated net book investment plus cash, materials, and supplies, $276,405,000, as shown in Column 6 of the exhibit is 5.67%.[23]

In *Reduced Rates, 1922,* 68 I. C. C. 676, at p. 683, in which the Commission fixed the fair return under the original section 15a at 5¾%, it said:

> Under our system of accounts all charges to the account "railway tax accruals" are deducted from railway operating revenues before arriving at railway operating income, and all State and Federal taxes, income or other, relating to carriers' railway property, operations, and privileges, are charged to that account. This method of accounting was recently sanctioned by the Supreme Court of the United States in *Galveston Electric Co.* v. *City of Galveston, supra.* As indicated by the Court, the net income under this accounting procedure is to the stockholder a tax-exempt income,

[23] "Net railway operating income" is not, of course, the carrier's net income or profit, even though it represents an amount left after payment of railway operating expenses and railway tax accruals, for, out of it the carrier must pay interest on its funded debt and other fixed charges.

and this fact should be considered in determining what return shall be deemed fair.

The railway operating income, increased or diminished, as the case may be, by the credit or debit balances in the accounts known as equipment rents and joint-facility rents, becomes net railway operating income, the amount of which is less than it otherwise would be by the amount of income tax accrued or paid. The term "net railway operating income" is defined in paragraph (1) of section 15a. Under paragraph (3), above quoted, rates are to be so adjusted that carriers as a whole or in designated rate groups will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return. If this were realized in any instance the carrier would receive that return over and above all taxes, including the Federal tax on income, and if the fair return as determined and made public by us were 6 percent the carrier would hold that return "tax free" in the sense that after payment of its income tax it would still have left the 6 percent.

Railway corporations, like all others, are subject to income taxes which, since January 1, 1922, amount to 12.5 percent on their net income less deductions computed as provided in the income tax law, 42 Stat. L., 277. In our view railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the

> public in the form of transportation charges adjusted to enable it to retain the designated fair return over and above the tax. We may observe that a fair return of 5.75 per cent, representing an aggregate annual net railway operating income arrived at after deducting, among other things, the Federal income tax on a return of 6 per cent, would be approximately the equivalent of a fair return of 6 per cent, out of which the Federal income tax was payable.

It will be noted that the Commission there considered "fair return" both before and after Federal income taxes and concluded that a fair return after Federal income taxes would be 5.75%.

As the Price Administrator's exhibit failed to show the amounts of Federal income taxes paid and there is no other evidence of record showing Federal income tax accruals for the odd period of 12 months ending with October 1943, we are unable to show from the record what the rates of return would have been for this period *after* Federal income taxes. The record indicates, however, that the rates of return for 1943, after Federal income taxes, when expressed in terms of the relation of net railway operating income to book investment, as exemplified by the figures for the Atlantic Coast Line given above, were not far from the fair rate of return, after Federal income taxes, of 5.75%, fixed by the Commission in 1922 under section 15a as it then stood. It is hardly

necessary to say that 5.75% is not now a statutory standard rate of return, as the Commission's determination of fair return fell into the discard upon the repeal of the original section 15a.

Evidence of record shows the rates of return after Federal income taxes for the carriers in the southern region and for 11 North Carolina respondents, for the 22-year period 1921–1942 (1942 being the last full year prior to the hearing). This evidence was embraced in an exhibit (R. 319–320) submitted by the respondents, showing, for the carriers in the Southern Region as a group, investment in railway property used in transportation service, operating revenues, operating expenses, taxes, net railway operating income, rate of return, and net income (R. 319). The exhibit shows the average rate of return (percentage which "net railway operating income" bears to undepreciated "investment in railway property used in transportation service") for the 10 years 1921–1930 as 4.2%; for the 12 years 1931–1942, 2.48%, and for the 22 years 1921–1942, 3.23%. In the "net income," i. e., net railway operating income plus other income minus interest on funded debt and other fixed charges, etc., it shows deficits as follows (R. 319):

Year	*Deficit*
1931	$22,503,485
1932	48,626,465
1933	16,048,078
1934	19,228,469
1935	24,736,251
1938	9,734,450

The exhibit further shows the rate of return of the same carriers for 1942 as 6.41%, for 1941 as 4.24%, and that the latter figure was higher than for any previous year subsequent to 1926.

For 11 of the 12 respondent carriers serving North Carolina,[24] the exhibit (R. 320) shows average rates of return for the 22-year period 1921–1942 as follows:

Road	Rate of Return Percent
Aberdeen & Rockfish	5.12
Atlantic & East Carolina	2.27
Atlantic Coast Line	3.10
Carolina & Northwestern	3.32
Clinchfield	3.94
Danville & Western	3.99
Louisville & Nashville	3.77
Norfolk Southern	2.26
Seaboard Air Line	2.42
Southern	3.74
Winston-Salem Southbound	3.24
Average	3.41

(The above figures embrace all transportation of the carriers concerned, freight and passenger, interstate and intrastate, and include the additional revenues resulting from the freight-rate and passenger-fare increases which became effec-

[24] The twelfth, Carolina & Tennessee Southern Ry. Co., a short line in western North Carolina, was abandoned on August 15, 1943, under the authorization of the Commission, 254 I. C. C. 828, because the entire length of its line was to be inundated by TVA (R. 318).

tive early in 1942 under the original authorization in *Ex Parte 148*. The figures showing deficits in the passenger service have previously been given, *supra*, pp. 59–61.)

VI

The Commission, in finding that the low intrastate fares operated unjustly to discriminate against interstate commerce, did not fail to give full consideraton to wartime conditions and the stabilization legislation

Price Administrator contends in his one assignment of error (R. 587) and in his brief (pp. 57–68) that the Commission, in finding unjust revenue discrimination, failed to "give full effect to wartime conditions and the stabilization legislation." In *I. C. C.* v. *Jersey City*, 322 U. S. 503, from which these words are quoted, this Court agreed with the statement of the District Court that the "Commission here is under a distinct duty in this particular case, to give full effect to wartime conditions and the stabilization legislation." "But that does not answer the real question," this Court said, "which is what is the effect of the stabilization legislation. In seeking this answer we are inquiring as to the relative powers and responsibilities of two federal agencies. Congress was free to apportion their functions as it saw fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies. Commerce Commission authorization of rate increases

could have been subjected to review or veto so far as any objection of the Commission is concerned.

"But Congress did no such thing. The legislative history of relevant provisions of the Act was reviewed in *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144. It was there pointed out that Congress rejected a proposal that such rates should not be increased without consent of the President. On the other hand it was assured by executive representatives that rate advances already subject to scrutiny on behalf of the public and to proof of reasonableness were not the source of the more substantial inflationary threats. Congress then adopted the provision we earlier quoted."

The provision earlier quoted, from the Inflation Control Act of 1942, is the proviso to section 1 that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such other agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or municipal authority having jurisdiction to consider such increase." (As stated in the Commission's report in this case (R. 92), the requirements of this proviso were complied with in each of the four section 13 proceedings.)

The decision in *I. C. C.* v. *Jersey City,* at pp.

522–523, also makes it clear that *the weight to be given to Price Administrator's contentions is for the Commission, not the court, to determine.* In so holding, the Court used this language:

> The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. It is without power to protect these essential transportation agencies from rising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganization, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent * * * What rates are required to meet actual and proper operating expenses, what revenue must be available to avoid defaults and sustain credit, what divisions should be made on interchanged traffic are as complex problems in rate-making as can readily be imagined. The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. We think the weight to be given to

the Price Administrator's contentions was for the Commission, not the court, to determine. The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the Company. Cf. *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98. If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals.

As in *I. C. C.* v. *Jersey City,* no charge that the Commission ignored the Administrator's contentions can fairly be made here. His main contentions, as stated in the report (R. 91) were (a) that the proposed increase in the intrastate fares would be inconsistent with the wartime stabilization program, (b) that the record is inadequate to support a finding of unjust discrimination against interstate commerce, but that if the Commission should find otherwise, the unjust discrimination should be removed by a reduction in the interstate fares to the level of the intrastate fares. These contentions were overruled by the Commission's ultimate findings. It seems obvious, too, that to have followed the suggestion to remove the discrimination by reducing the inter-

state fares to, from, and through North Carolina to 1.65 cents would have inevitably resulted in the lowering to that level of all other fares in the South, both interstate and intrastate, and thus to have established the fares generally throughout that territory on a basis which the Commission found to be "subnormal" (R. 74).

Respecting the first contention, to the effect that to raise the subnormal intrastate fare of 1.65 cents to the 2.2-cent level prevailing interstate throughout the country and intrastate in 44 of the 48 States, in order to remove undue prejudice and unjust discrimination against interstate commerce, would be inconsistent with the wartime stabilization program: The Commission cited its report in *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723 (Dec. 1942) which dealt with a similar situation.[25] The Texas regulatory body had refused to permit increases in intrastate freight rates and passenger fares corresponding to those authorized on interstate traffic in the original report in *Ex Parte 148*. Section 13 proceedings were instituted, in which the Price Administrator, as here, intervened and actively opposed any increases in the intrastate rates or fares (253 I. C. C., 733). The Commission was thus confronted, for the first time, with the question of the effect of the anti-inflation leg-

[25] See reference to this report in *I. C. C.* v. *Jersey City*, 322 U. S., footnote 8, pp. 320–321.

islation upon a section 13 case involving alleged undue prejudice and unjust discrimination against interstate commerce resulting from a disparity between interstate rates, previously found reasonable, and intrastate rates controlled by State authority. After review and consideration of the provisions of the Emergency Price Control Act of 1942, and the amendments of the Stabilization Act of October 2, 1942, the Commission reached the conclusion that those acts made no direct changes in, or additions to, the administrative provisions of the Interstate Commerce Act relative to transportation rates and charges, except the requirements as to notice to and intervention by the designated Federal agency (*Ib.*, 733–4). This holding was subsequently sustained by this Court in *I. C. C.* v. *Jersey City, supra.*

The Commission agreed, however, with the contention of the Price Administrator that, under the Emergency Price Control Act, as amended by the Stabilization Act of October 2, 1942, the Commission, in determining the lawfulness of proposed increases in transportation charges, should consider, in addition to the factors ordinarily considered under the Interstate Commerce Act, the effect of such increases on the price control and stabilization program. In this regard the Commission stated it was not unmindful of the evil effects of inflation, and that, in its judg-

ment, the inflationary tendencies of general increases in rates constitute a factor which it may and should take into consideration in passing judgment upon such increases, citing sections 1 and 15a of the Interstate Commerce Act, the National Transportation Policy contained in section 1 of the Transportation Act, 1940, and *Texas & P. Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197.[26] "Increases in the general price level ultimately affect the costs of rendering transportation service and the value of such service to the public. Such considerations were in fact carefully weighed and reflected in the increases which we authorized under Ex Parte No. 148. These increases were graded from nothing at all through 3 percent and 6 percent on freight to 10 percent on passenger traffic" (*Ib.,* 733–4).

The Commission pointed out that the increases sought on Texas traffic were part of a general increase proposed by the carriers on all interstate and intrastate traffic; that the carriers sought merely to apply increases on intrastate traffic in Texas similar to those which it had authorized on interstate traffic throughout the country, including that to, from, and through Texas. The Commission found and concluded that the intra-

[26] In that case, at p. 219, the Court said:

"Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress."

state rates and fares involved resulted in both types of discrimination forbidden by section 13 and ordered these discriminations removed by increases in the intrastate charges to the level of the interstate charges as modified by the *Ex Parte 148* increases, which were found to be just and reasonable.

The conclusions so reached in the *Texas* case were reaffirmed in the subsequently issued report on further hearing in *Ex Parte 148*, 255 I. C. C. 357, 392–393. The Price Administrator there contended that the Emergency Price Control and Stabilization Acts modify or amend the provisions of the Interstate Commerce Act, and that, in the determination of a reasonable level of rates and fares, the Commission must be controlled by the provisions of the Price Control and Stabilization Acts and administrative action thereunder. It was his position that the "adequate transportation" provisions of the Interstate Commerce Act are superseded by the "anti-inflation" provisions of the Stabilization Act, and that "all regulatory standards must yield to the dominant purpose of the Stabilization Act." The Commission was unable to agree with this view. It stated (255 I. C. C., p. 392):

> At a time when war has imposed unprecedented burdens on the railroads, and has brought them unprecedented earnings, our duty is to determine a rate structure

> that will meet the requirements of the national transportation policy and the other governing provisions of the Interstate Commerce Act. We recognize the congressional obectives in the Price Control and Stabilization Acts to prevent inflation during the present emergency, and in the administration of those statutes the Director of Economic Stabilization and the Price Administrator will have our cooperation. *We are also cognizant of the vital importance of the national transport system in this crisis. Revenues from operations must be sufficient so that mere lack of money may not be the cause of impairment of the transportation system.* [Italics supplied.]

These conclusions were adhered to by the Commission in the case at bar. (R. 91.) It is significant that in its latest report in *Ex Parte 148*, 259 I. C. C. (Dec. 12, 1944), at p. 189, the Commission found that—

> Nothing in the record shows that the 10 percent increase in passenger fares has had any inflationary effect.

For the above reasons we submit that the Commission, in finding that the intrastate fares involved operated unjustly to discriminate against interstate commerce, did not fail to give full consideration to wartime conditions and the stabilization legislation.

CONCLUSION

It is respectfully submitted that the decree of the court below, sustaining the Commission's order and dismissing the complaint, should be affirmed.

DANIEL W. KNOWLTON,
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Interstate Commerce Commission.

APRIL 1945.

APPENDIX

The Interstate Commerce Act, as amended (49 U. S. C.), provides:

SECTION 13

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commis-

sion. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged; and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a.

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Com-

> mission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

The National Transportation Policy, as declared in the Transportation Act of 1940 and enacted as a part of the Interstate Commerce Act to precede Part I thereof (c. 722, 54 Stat. 898, 899; 49 U. S. C., preceding sec. 1) reads:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water,

highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

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BRIEF FOR APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 561

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 592

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ALABAMA GREAT SOUTHERN RAILROAD CO., ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the District Court for the Eastern District of North Carolina, entitled *State of North Carolina* v. *United States,* is reported in 56 F. Supp. 606 (561–R. 548).[1]

The opinion of the District Court for the Western District of Kentucky, entitled *State of Alabama* v. *United States,* is reported in 56 F. Supp. 478 (592–R. II, 1345–1362).

The Report of the Interstate Commerce Commission in *Alabama Intrastate Fares* and related cases is reported in 258 I. C. C. 133 (561–R. 69, 592–R. I, Ex. B, p. 1). The Commission's Corrected Order of May 8, 1944, is printed as Appendix A to this brief.

JURISDICTION

The jurisdiction of this Court is invoked under Section 210 of the Judicial Code, U. S. C. Title 28, Section 47a.

The Order of the District Court for the Eastern District of North Carolina was entered July 22, 1944 (561–R. 545). The petition for appeal was duly presented to the District Judge and an order was signed allowing the appeal on September 18, 1944 (561–R. 587). Probable jurisdiction was noted by this Court on November 13, 1944 (561–R. 596).

[1] This brief involves two printed records which are separately designated in this brief by the numbers of the two appeals. The record in the appeal of the North Carolina case is designated 561–R. The other record is designated 592–R.

The Order of the District Court for the Western District of Kentucky was entered on August 3, 1944 (592–R. II, 1362). The petition for appeal was duly presented to the District Judge and an order was signed allowing the appeal on September 29, 1944 (592–R. II, 1379). Probable jurisdiction was noted by this Court of November 13, 1944 (592–R. II, 1393).

QUESTION PRESENTED

The question presented by the Economic Stabilization Director and Price Administrator is whether the action of the Interstate Commerce Commission, in annulling the orders of the State Commissions denying intrastate passenger fare increases not presently necessary, constituted an unlawful application of section 13 (4) of the Interstate Commerce Act, both because of the Commission's failure to apply the criterion for the application of that provision which has been established by the decisions of this Court, and also because of the Commission's disregard of wartime conditions and the stabilization legislation.

STATUTES INVOLVED

The following statutory provisions are printed in Appendix B to this brief.

Section 13 (4) of the Interstate Commerce Act, 49 U. S. C., sec. 13 (4).

Section 15a of the Interstate Commerce Act, 49 U. S. C., sec. 15a.

Section 1 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. App., Supp. III, sec. 901.

Section 1 of the Stabilization Act of 1942, 50 U. S. C. App., Supp. III, sec. 961.

STATEMENT

1. HISTORY OF THE PROCEEDINGS

Prior to the proceedings involved in these appeals the railroads operating in Southern Passenger Association territory (herein called the railroads) filed a petition with the Interstate Commerce Commission in July 1942, seeking permission to increase interstate passenger coach fare from the general basis of 1.65 cents to 2.2 cents per mile.[2] By an order of August 1, 1942, under the proceeding in Ex Parte 148, *Increased Railway Rates, Fares, and Charges, 1942*, the Commission authorized the railroads to apply increases of 10 percent to fares on the basis of 2 cents rather than 1.5 cents per mile, on the ground that they were already entitled to avail themselves of the 2-cent fares which had been authorized on a nation-wide basis in *Passenger Fares and Surcharges*, 214 I. C. C. 174 (561–R. 72–73; 592–R. I, Ex. B., pp. 8–9, and II, 982).

A tariff was filed on behalf of the Southern railroads, effective October 1, 1942, making the increase of fares authorized by the Interstate Commerce Commission. These increases were protested by the Price Administrator, but the Com-

[2] See Report of the Interstate Commerce Commission, 561–R. 73; 592–R. I, Ex. B, p. 8.

mission declined to suspend (561–R. 73; 592–R. I, Ex. B., p. 9).

By procedures in compliance with State laws, the railroads then sought increases of intrastate fares to the level of those effective in interstate commerce. After hearings, at which the Price Administrator appeared as protestant, the State commissions of Alabama, Kentucky, North Carolina, and Tennessee refused to authorize the increases, on the ground that the carriers had failed to show that the increased fares and revenues were just and reasonable.[3] The Kentucky Railroad Commission expressly referred to the stabilization legislation and the President's "Hold-the-Line" Order of April 8, 1943, as one of the bases for its action (592–R. II, 1071).

The North Carolina Utilities Commission filed a petition with the Interstate Commerce Commission in July 1943, seeking an investigation into the reasonableness of the interstate fares in North Carolina (561–R. 384). Soon afterwards, petitions were filed with the Interstate Commerce Commission by the Alabama Public Service Commission and by the Price Administrator seeking an investigation into the reasonableness of the interstate level of fares in the

[3] See the reports of each of the four State Commissions:
Alabama, 592–R. II, 439.
Kentucky, 592–R. II, 1062.
North Carolina, 561–R. 128.
Tennessee, 592–R. I, Ex. B., p. 49.

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Southern region. These three petitions were denied by the Interstate Commerce Commission without formal hearing or report (561–R. 81; 592–R. I, Ex. B, pp. 19–20).

Following the States' denial of the increases of fares, the principal railroads operating in each of the four States filed separate petitions with the Interstate Commerce Commission seeking orders under section 13 (4) of the Interstate Commerce Act to require increases in the intrastate rates of these four States to the level of the interstate fares. The Commission instituted investigations by four separate orders, and conducted four separate hearings. The Price Administrator, on his own behalf and on behalf of the Economic Stabilization Director, appeared in each of the four proceedings and introduced evidence in all but the Alabama case (561–R. 70–71; 592–R. I, Ex. B., pp. 5–6). The examiner in the Alabama and Kentucky cases issued two separate proposed reports denying the relief sought by the railroads operating in those States (592–R. II, 513, 1677).

The cases were argued together before the Interstate Commerce Commission, and decided in one report, *Alabama Intrastate Fares, supra.* The Commission found (1) that the interstate fares on the basis of 2.2 cents per mile are just and reasonable; (2) that the intrastate fares in Alabama, Kentucky, North Carolina and Tennessee were lower than interstate fares; (3) that passenger

transportation conditions in interstate and intrastate commerce are substantially similar; (4) that such transportation in the same trains and generally in the same cars results in undue and unreasonable advantage and preference of the intrastate passengers and undue and unreasonable disadvantage and prejudice of interstate passengers; (5) that the lower intrastate fares produced at least $2,275,000 per annum less than if the level of interstate fares had been in effect, and traffic moving under the lower intrastate fares "is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service"; and (6) that maintenance of the lower intrastate fares resulted in violation of section 13 (4) of the Interstate Commerce Act. The Commission held that the unlawfulness should be removed by increasing the intrastate fares to the interstate level (561–R. 95; 592–R. I, Ex. B., pp. 37–38).

On April 26, 1944, the Price Administrator duly filed a petition for reconsideration of this decision, as did all of the other appellants (561–R. 412; 592–R. II, 466). All petitions were summarily denied by an order of May 8, 1944 (561–R. 508).

By a separate order of May 8, 1944, corrected by another order of the same date, the Commission required the railroads to increase their intrastate fares in Alabama, Kentucky, North Carolina, and Tennessee to the interstate level

(printed as Appendix A to this brief. See 561–R. 507; 592–R. I, Ex. A., p. 1). This is the order against which these suits were brought.

The North Carolina appellants filed petitions in the District Court for the Eastern District of North Carolina upon many grounds, seeking an injunction to set aside the order of the Interstate Commerce Commission as unlawful; and the appellants in the Alabama, Kentucky, and Tennessee cases sought similar relief in the District Court for the Western District of Kentucky.* The three-judge district courts convened to hear the cases declined to enjoin and set aside the order of the Commission and dismissed the complainants; whereupon these appeals were taken to this Court.

The recent history of passenger coach fares in the South is of considerable importance to an understanding of this case, and its explanation at this point will bring out implications of facts not readily seen from the Commission's report.

A HISTORY OF SOUTHERN PASSENGER COACH FARES

The prewar basis of "standard" or coach fares in the Southern region was established on December 1, 1933, at the level of 1.5 cents per mile one-way. The railroads and the Commission described the basis of fares as "experimental", "to

*For Price Administrator's petitions, see 561–R. 38, 592–R. II, 1098. Because of the similarity in form and context, the petitions in the *Alabama* and *Tennessee* cases were omitted from printing.

attract traffic that had been diverted chiefly to private automobiles" (561–R. 71, 74; 592–R. I, Ex. B., pp. 6, 7, 10).

In 1936 the Commission concluded an investigation of the level of passenger fares over the entire country and required the railroads to establish fares of not more than 2.0 cents per mile, which resulted in reductions of fares for some railroads, although many Southern and Western carriers had even lower fares in effect. *Passenger Fares and Surcharges, supra.* While these fares were below the costs of the service, the Commission justified its action upon the fact that competition from motor vehicles had made railroad passenger travel unprofitable, and the fact that lower fares would attract traffic and produce greater total revenues (214 I. C. C. at 230–232). But, moreover, compensation for the deficits was provided. The Commission pointed out that it had given consideration to the necessity of supporting the passenger service when it established general levels of freight rates (214 I. C. C. at 225–227). In that 1936 report, the Commission made the following specific finding with respect to the lower fares of the Southern region:

> There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results

than the higher fares. These matters are left to the discretion of respondents. (Finding No. 11, at p. 255)

The present experimental fares in the southern * * * district(s) * * * are not unreasonable or otherwise unlawful. (Conclusion No. 3, at p. 257)

The higher basis of fares on the 2 cents level was tried by the Southern railroads for 14 months ending January 15, 1939; but the former basis of 1.5 cents per mile was then restored for the reason stated in identical language by the railroads' evidence in each of these four records that "it would be to their advantage to restore the former one-way coach fare of 1.5 cents per mile."[5] The railroads' evidence shows that 1938 revenue per coach mile was less than for 1937 by 7.6 percent in Kentucky, 11.4 percent in North Carolina, and 10.3 percent in Tennessee, as compared with a decline of revenues per parlor and sleeping car mile of 4.8 percent in Kentucky, a slight increase in North Carolina, and a decline of 2.7 percent in Tennessee. Following a lag in 1939 in which year the fares were reduced, coach-mile revenues increased in 1940 over 1938 by 3.7 percent in Kentucky, 19.4 percent in North Carolina, and 4.9 percent in Tennessee, in striking contrast to declines of revenue in parlor and sleeping cars in each of the three States. The Alabama record does not contain data separately for the two

[5] 561–R. 300; 592–R. I, Ex. B., p. 72, II, 556–557, 1148–1149.

classes of service, but revenue per passenger-carrying car-mile dropped 6.8 percent from 1937 to 1938, and decreased slightly from 1938 to 1940.[6]

On January 21, 1942, in Ex Parte 148, the Interstate Commerce Commission issued an order authorizing the railroads of the country to increase all passenger fares by 10 percent to compensate for increased wartime expenses, particularly those resulting from increased wage awards. *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545. The increases became effective on February 10, 1942, raising the Southern passenger fares from the general basis of 1.5 to 1.65 cents per mile. This increase of 10 percent in passenger fares was made effective for the duration of the war and six months thereafter. With respect to the effect of the increase upon passenger traffic, the Commission said (248 I. C. C. 565):

> Because of the *abnormal* conditions which now prevail throughout the country, we are of the opinion that increased fares proposed will yield substantial amounts of

[6] The data from which all of these percentages were computed were part of the railroads' evidence in the case. An abstract of these data with reference sources in the Records, is set forth as Appendix C to this brief. This appendix makes a statistical comparison of the effect of the coach fare increases from 1.5 to 2 cents per mile for the period from Nov. 15, 1937, to Jan. 15, 1939, with the effect of the same increase when applied under wartime conditions in which there is so much less in competition from motor vehicles.

additional revenues * * *. [Italics added.][7]

In 1943, upon petition of Appellants herein, the Commission reopened Ex Parte 148 and suspended the freight rate increases authorized in the prior year, but retained the passenger fare increases of 10 percent because passenger traffic had not become as profitable as the freight traffic and because the increased fares would tend to discourage passenger travel. "*Increased Railway Rates, Fares, and Charges, 1942*, 255 I. C. C. 357,

[7] In a subsequent report of Dec. 12, 1944, 259 I. C. C. 159, 187, in the same proceeding, the Commission said:

"Passenger traffic in recent war years has increased greatly because of movements of troops, the furlough travel of persons in the military services, and travel by relatives visiting persons in the services, increases in national income, curtailed service by competing passenger carrying agencies, and severe restrictions in the amounts of gasoline and tires available for private automobile use. It is estimated that 17 percent of present passenger traffic is military traffic, and about 16 percent military furlough traffic.

"*Effects of wartime conditions upon rail passenger traffic are particularly noticeable in the data submitted for railroads in the southern region.* In that region, passenger revenues in 1943 as compared with those in 1939 increased to a greater extent than in other sections or in the country as a whole. Passenger revenues of southern region railroads amounted to $45,901,905 in 1939. They were $283,000,000 in 1943, an increase over 1939 of about 516 percent * * * *The great increase in the southern region is due to the curtailment in other modes of travel, particularly in the use of private automobiles, and to the establishment in that region of a large number of military training camps.* * * *" [Italics added.]

394–5. Mention was made of the increased Southern passenger fares, effective October 1, 1942, and of the fact that except in Mississippi all intrastate fares were still on the lower basis (pp. 286–7).

In other words, except for the 10 percent fare increase, it was not until the present Section 13 (4) proceeding that the Commission allowed the Southern railroads to make the increases which shortly before the war they had found to be impractical and which had become profitable only because of wartime conditions such as the movement of military personnel and wartime scarcities or rationing of gasoline, tires, and automobiles. How great the effect of wartime passenger traffic increases has been upon railroad revenues is shown on pages 48 and 49 of this brief.

On December 12, 1944, the Commission again reconsidered the 10 percent passenger fare increases in the last-cited proceeding. The Commission refused to suspend the increases, however, for substantially the same reasons given in the report involved in these appeals. The report compared present fares with those in effect after the first World War, and the Commission pointed out that the 1942 passenger service operating ratio had been decidedly less favorable than for the freight service. No weight was given to the sharp increases of passenger traffic in 1943 and 1944 which brought down the passenger operating ratio nearly to the level of the operating ratio for the

freight service. The Commission's apparent belief that the railroads should be allowed to recoup for past deficits is reflected in an observation in one of the concluding paragraphs that "Passenger traffic for the entire period 1930 to 1941, inclusive, failed to pay its proper share of expenses." *Increased Railway Rates, Fares, and Charges, 1942*, 259 I. C. C. 159, 194.

3. OPINIONS BELOW.

The opinions of the District Courts for the Eastern District of North Carolina and the Western District of Kentucky are quite similar, differing principally in that the Kentucky Court did not pass upon the validity of the Commission's finding with respect to undue preference to intrastate travelers and prejudice to interstate passengers.

The common issue in the two decisions of the District Courts was the question whether the lower intrastate fares imposed a revenue burden upon interstate commerce. We joined the States in contending that passenger fares on the basis of 1.65 cents per mile sufficed under existing wartime traffic conditions to provide the railroads with a reasonable rate of return. The Kentucky court conceded the factual basis for this contention, saying: "That may be the result, at least temporarily. But the proposed increased rates are not based on the need for additional revenue. The proposed increase is for the purpose of removing an unjust discrimination against interstate commerce which

the Commission is empowered to do regardless of resulting increased revenues or the non-existence of any need for the same." The court also observed that "present large revenues flow from abnormal traffic conditions, clearly only temporary in their nature. With the return to normal conditions, including the resumption of strong competition from trucks and busses, the combined returns may not be unreasonable." (592–R. II, 1359.)

The North Carolina District Court said: "It is argued, also, that it was incumbent upon the Commission, in condemning intrastate fares as discriminatory, to determine the reasonableness of interstate fares in the light of existing conditions and not of conditions that existed in former years; but it is clear that the Commission had had existing conditions in mind in finding the interstate fares to be reasonable. It is well settled that ordinarily the experience of a single year is an unsafe guide in fixing prices * * *. Particularly is this true when the single year is a war year and the conditions are abnormal." (561–R. 563–564.)

The North Carolina District Court, having approved the Commission's finding with respect to the reasonableness of the fares, concluded that: "The reasonableness of the interstate fares being established, there can be little question as to the discriminatory character of the intrastate fares. It is established that the same service is afforded intrastate passengers as is afforded in interstate

service; and, where this is true, discrimination is ordinarily established with sufficient certainty by showing a difference in rates, * * *" (561–R. 567), "And it is equally clear that discrimination has been shown within the meaning of the statutory provision against the interstate commerce of the carriers in that, because of the intrastate fare, intrastate passengers are not making their proportionate contribution to the maintenance of the transportation system." (561–R. 568.)

Neither court attempted to distinguish the line of reasoning followed by them from the rule laid down by this Court that "the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." *Florida* v. *United States*, 282 U. S. 194, 212.

The North Carolina Court relied for authority on *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485, failing to note, however, that in that case, as this Court observed, the "Commission had before it evidence showing that the cost of the traffic largely exceeded the revenue derived from the old rates", and that there were additional facts showing undue preference, prejudice, and burdens upon interstate commerce.

SPECIFICATION OF ERROR TO BE URGED

The District Courts erred as a matter of law in concluding that the findings and order of the

Interstate Commerce Commission were based on substantial evidence, did not involve errors of law, and were not arbitrary or unreasonable. In particular, the District Courts erred, as a matter of law, in concluding that there was substantial evidence of record to sustain, consistently with the Commission's duty to "give full effect to wartime conditions and the stabilization legislation", the Commission's finding that an undue, unreasonable, and unjust discrimination against interstate commerce, within the meaning of section 13 (4) of the Interstate Commerce Act, had resulted from the decisions and orders of the four State commissions declining to authorize intrastate passenger fare increases under wartime conditions productive of net revenues (including net passenger operating revenues) in excess of those required to meet maintenance and operating costs and to yield a fair return.

SUMMARY OF ARGUMENT

The contention advanced in this case by the Economic Stabilization Director and the Price Administrator is simple but fundamental. We contend that the Commission did not apply the proper criterion in reaching, and the District Courts erred in upholding, the Commission's fifth finding that "traffic moving under these lower intrastate fares is not contributing its fair share of revenues *required* to enable respondents [the railroads] to render adequate and efficient trans-

portation service." [Italics added.] This finding was essential to the Commission's decision that the intrastate fares discriminated unjustly against interstate commerce, in view of the interpretation placed upon Section 13 (4) of the Interstate Commerce Act in the *First Florida Log Case*, 282 U. S. 194, and later decisions.

1. The criterion of undue revenue discrimination against interstate commerce, as established by the decisions of this Court, is the sufficiency of the contribution made by the intrastate rates or fares to the revenues required by the railroads to enable them to maintain adequate and efficient transportation service. A proper application of this criterion requires the Commission to make determinations on two distinct questions: (1) whether the railroad revenues are greater or less than the amount actually required for adequate and efficient transportation service; and (2) whether the intrastate fares enable the intrastate traffic to make a sufficient contribution to the amount of required revenues.

The controlling criterion could not be satisfied by the determination made by the Commission that the interstate fares were reasonable and that the lower intrastate fares were charged for substantially the same service. Neither of these determinations is incompatible with determinations that the railroad revenues were in fact higher than actually required and that the intrastate fares did made a sufficient contribution to

the revenues which in fact were required. It is evident, therefore, that the Commission did not properly apply the controlling criterion in reaching its basic fifth finding.

2. If the Commission had sought to apply the proper criterion in these proceedings, the evidence of record would not have permitted it to make the basic determinations which, under this criterion, were necessary to sustain its order.

A. The Commission could not properly have determined, on the evidence of record, that the then prevailing level of railroad revenues was no higher than that required to enable the railroads to render adequate and efficient transportation service. On the contrary, the level of revenues was then far higher than enjoyed by the railroads in peacetime, and was yielding a rate of return in excess of the rate needed to sustain such service. Moreover, in such slight consideration as the Commission gave to the railroads' rate of return, it erred in relying upon a palpably excessive rate base and in calculating net revenue after all income and excess profits taxes.

B. Not only was there no evidence of record to show that, under the lower intrastate fare, the intrastate passenger traffic was not making a sufficient contribution to required revenues, but the evidence points irresistibly to the contrary conclusion. The mere existence of the disparity between interstate and intrastate fares, even if charged for

substantially the same service, could not sustain a finding that the lower intrastate fares were not contributing a sufficient share of the required revenues, in view of the following considerations:

(a) The 1.5 cents passenger fares in the southern states were expressly approved by the Commission as reasonable when in 1936 it ordered 2.0 cents fares elsewhere.

(b) Such additional revenues as the Commission found necessary to meet increased costs due to war were provided when in January, 1942, the Interstate Commerce Commission authorized the 10 percent increases for *both* the 1.5 cents and 2.0 cents fares.

(c) Those increased revenues have more than met the increased costs due to war; indeed, with the greatly increased volume of business has come the greatest and most profitable volume of passenger traffic in railroad history, resulting in more than a fair return from the wartime increase of passenger fares.

(d) The Commission had long subsidized passenger service deficits from a support factor in peacetime freight rates which has not been removed, but which has been multiplied in its effect by the wartime increase of freight traffic.

(e) The intrastate passenger fares of 1.65 cents per mile were shown by data of record to be approximately at the level of the average of all fares (including fares at furlough rates of 1.25 cents per mile) collected by the railroads and well above their cost of operating the passenger service.

(f) The 1.65 cents intrastate fares had been found reasonable by each of the four State commissions.

3. The fifth finding of the Interstate Commerce Commission may not lawfully be based on the supposition that, *after the war,* the railroads would require all the revenues that could be produced by uniform 2.2 cents interstate and intrastate fares and that, therefore, the intrastate fares should be raised *now.* Such reasoning would disregard—

(a) the Commission's duty to give full effect to the national stabilization program, since it would allow the railroads to take advantage of wartime shortages and wartime travel needs to impose immediate, direct, and unnecessary increases in the cost of living, at a time when inflationary dangers are greatest, merely to anticipate a conjectural future contingency;

(b) the Commission's statutory duty to cooperate with State commissions, a duty rendered especially imperative where the State commissions' action has been in accord with (and in one instance expressly in response to) the President's admonition to all Federal, State, and municipal agencies to disapprove rate increases in order to keep down the cost of living and to effectuate the purposes of the stabilization program;

(c) the fact that, since under peacetime conditions the railroads' own experience demon-

strated that 1.5 cents per mile was the most profitable passenger fare, the higher fares would not actually contribute to postwar revenues but would merely exploit temporary wartime shortages and travel needs.

It is difficult to escape the conclusion that the Commission overrode considered judgments of the State commissions, not because the 1.65 cents intrastate fares are unreasonable, not because the railroads need more revenues now, and not because they would need a 2.2 cents intrastate fare in the future, but simply because they could exact that fare from their wartime traffic so that their surpluses, augmented by this exaction, would give comfort for lean years.

Such reasoning, if pursued by railroad managements, would be natural enough. To charge what the traffic will bear is what a seller in the market is expected to do. Indeed, that is one of the principal reasons why we have regulatory commissions in peacetime and stabilization programs in wartime. But surely the regulatory agency itself cannot lawfully resort to such a theory, especially when to do so requires the Commission to overrule the action of State commissions which sought only to require the railroads to adhere to intrastate fares which had been found reasonable in peacetime and highly remunerative in wartime.

ARGUMENT

Delimitation of Appellants' Position

Because of certain statements in the opinions of the district courts below, the Court may possibly be led to misunderstand our position in these appeals. Therefore we wish to delimit the scope of our position to make it clear that we do not controvert matters settled in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144; *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489; and *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503. We have refrained from raising procedural questions in these appeals, and we acknowledge that we have no special status differing from any other party to the proceedings. We also acknowledge that it is the Commission which has the power to determine the weight to be given the facts of record and the contentions of the various parties. We contend, however, that the Commission did not follow lawful criteria either in its application of the Interstate Commerce Act or in the application of the complementary policies of that Act and the stabilization legislation.

In this brief we do not argue the question of undue preference to intrastate passengers and prejudice to interstate passengers. The Kentucky District Court did not pass upon this issue. The dissent of Commissioners Splawn, Aitchison, and Mahaffie goes into the issue in considerable

detail, and the State appellants in the companion appeals will deal with the question fully.

I

THE COMMISSION FAILED TO APPLY THE CONTROLLING CRITERION IN REACHING ITS BASIC FINDING THAT THERE HAS BEEN AN UNDUE REVENUE DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Our argument challenges the correctness of the Commission's application of that provision of Section 13 (4) of the Interstate Commerce Act which forbids any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. This Court has held that that provision "confers on the Commission the power to raise intrastate rates so that intrastate traffic may produce its fair share of the earnings *required* to meet maintenance and operating costs and to yield a fair return on the value of property," *United States* v. *Louisiana*, 290 U. S. 70, 75; *Second Florida Log Case* (*Florida* v. *United States*), 292 U. S. 1, 5. [Italics added.] The same rule was formulated in somewhat different terms by this Court when it stated that an increase of intrastate rates could be required when "needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system." *First Florida Log Case*, 282 U. S. 194, 212.

In the light of these decisions, it is clear that the criterion for determining an undue revenue discrimination against interstate commerce is the burden on commerce resulting from an insufficient contribution by intrastate rates or fares to the required railroad revenues. Therefore, proof of the sufficiency of the intrastate rates or fares for this purpose is proof of the fairness of their contribution.[8] Hence in this and any like case, it becomes incumbent on the Commission to make determinations on two distinct questions: (1) Whether the railroad revenues are greater or less than the amount actually required for adequate and efficient transportation; and (2) whether the intrastate fares enable the intrastate traffic to make a sufficient contribution to the amount of the required revenues.

The Commission's fifth finding appears consonant with the established criterion when it states

[8] The similarity of the service rendered to the two types of traffic would normally become significant only in determing the sufficiency of the contribution. Here we are content to assume (for purposes of argument only) that the services rendered the two types of traffic are substantially the same. However, the States of Alabama, Tennessee, and North Carolina are contending, upon the basis of persuasive evidence of record, that intrastate service is generally inferior to that furnished by trains scheduled primarily for interstate service. Since the issue is one peculiarly within the competency of the States to develop, we have not argued the point in this brief.

that "traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service." (561–R. 95; 592–R. I, Ex. B., p. 38.) It is only when one examines the record and report that the Commission's actual failure to apply the appropriate criterion becomes evident. Thus, in the Alabama, Tennessee, and North Carolina proceedings, the Commission made no determinations whatever as to the railroads' rates of return, and its finding on this point in the Kentucky case was vitiated by errors described in the succeeding section of this brief.

The Commission and the District Courts alike seem to have reasoned in reaching, and in sustaining, the conclusion embodied in the Commission's fifth finding along the following lines: (1) The interstate fares are reasonable; (2) the service rendered interstate and intrastate passengers is approximately the same; (3) but the intrastate fares are lower; (4) therefore, the traffic moving under the intrastate fares is not contributing its fair share of the revenues required to provide adequate and efficient transportation service.

The *non sequitur* is patent. Not only did the Commission fail to establish the level of revenues required to provide adequate and efficient service, but neither the Commission nor the Courts considered it essential to establish that the 1.65 cents

fares were preventing a sufficient contribution to such revenues by intrastate traffic. Neither proposition was, or could be, established by a determination that the level of interstate fares was reasonable. It is, of course, quite possible at any particular time for fares to yield more revenues than the amount necessary to provide such service. Normally a "zone of reasonableness" is recognized within which all fares are regarded as reasonable. A lower fare within that zone may contribute sufficient revenue to provide adequate and efficient service, and a higher fare may contribute more than the amount required. Under such circumstances the fact that the lower fare is intrastate and the higher fare is interstate does not convert the former into a revenue burden on interstate commerce.

The Commission did not rebut the possibility that the 1.65 cents intrastate fare might thus be providing a sufficient contribution to railroad revenues. On the contrary, as dissenting Commissioners Splawn, Aitchison and Mahaffie observed:

> There is *nothing in the report or the evidence* to indicate that the revenues from the present passenger fares are less than those *required* to enable respondents to render adequate and efficient transportation service, or that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole. As a matter of fact, *it does not affirmatively*

> *appear on this record* that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than *required* to enable respondent to render the character of service contemplated by section 15a. [Italics added; 561–R. 102; 592–R. I, Ex. B., p. 46.]

Such a deficiency in the record alone would suffice to invalidate the Commission's order in view of the requirement laid down by this Court in the *First Florida Log Case, supra* (282 U. S. at p. 212): "* * * it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify the conclusion" that the increase of intrastate rates was "needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system * * *."

Moreover, computations which we have made from evidence of record in the succeeding section of this brief reveal that the record was not merely negative on the issue of the adequacy of the 1.65 cents intrastate fares. We shall show that, if both the interstate and the intrastate fares had been fixed at the 1.65 cents level of the intrastate fares, the revenues yielded would have been ample to enable the railroads to render adequate and

efficient transportation service. Finally, as the last section of the brief will demonstrate, the only plausible basis which might be asserted to support the Commission's action brings the Commission squarely into collision with its legal duty to give full effect to wartime conditions and the stabilization legislation.

II

IF THE COMMISSION HAD SOUGHT TO APPLY THE PROPER CRITERION TO GOVERN UNDUE REVENUE DISCRIMINATION UNDER SECTION 13 (4), THE EVIDENCE OF RECORD WOULD NOT HAVE PERMITTED IT TO MAKE THE BASIC DETERMINATIONS ESSENTIAL TO SUSTAIN ITS ORDER.

A. *The evidence clearly showed that the level of revenues then prevailing was far higher than that enjoyed by the railroads in peacetime and was yielding a rate of return in excess of that needed to render adequate and efficient transportation service.*

1. *The rates of return were excessive.* No finding of rates of return was made by the Commission in the Alabama, Tennessee, and North Carolina cases, although all four records contained data, discussed below, leading to the conclusion pointed out by the dissenting Commissioners that railroad revenues were sufficient without the passenger fare increases to produce more than a fair return to the railroads. In the Kentucky, Tennessee, and North Carolina records there are

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exhibits which we introduced at the hearings giving data from the railroads' reports to the Interstate Commerce Commission which enable rates of return to be determined upon a base consisting of book investment of the carriers in transportation property, plus unadjusted cash, materials and supplies, less accrued depreciation and amortization of defense projects, divided into net railway operating income before payment of Federal income and excess profits taxes. The results are as follows:

	Rate of Return On Depreciated Investment Base Before Federal Income Taxes
7 Kentucky railroads	
12 mos. ended June 30, 1943	18.11%.*
8 Tennessee railroads	
(592-R. I, Ex. B., p. 414)	19.5%. (18.8% after deduction of rent for leased road equipment).
7 North Carolina railroads	
(561-R. 408, folio 581)	18.3% (18.0% after deduction of rent for leased road and equipment).

At all four hearings in these cases the railroads submitted rate-of-return evidence which fails to support the conclusions which they sought

* Computed by adding figures in Columns 4, 5, and 6 of Exhibit 17, 592-R. II, 1325 for the C. & O., C. N. O. & T. P., G. M. & O., I. C., L. & N., N. C. & St. L., and Southern railroads, totalling $2,740,340,(000), which is divided into net railway operating income before Federal income taxes for the same railroads for the 12 months ended June 30, 1943, (as shown in Ex. 12, 592-R. II, 1321, totalling $346,506,(000).

to derive from it. Their rate base was *undepreciated* "investment in transportation property used," Schedule 211–N as reported to the Interstate Commerce Commission, plus totals of cash, materials and supplies, *unadjusted*, to fit working capital needs, divided into net railway operating income *after all taxes*, including Federal income and excess profits taxes. The amount of the taxes is shown in the railroads' exhibits, however, and on this basis all four records show a rate of return for Class I railroads in the Southern region, for 1942, of 12.23 percent before taxes and 6.41 percent after taxes. These rates of return are the highest for the twenty-two consecutive years shown in the exhibits.[10]

In all four cases, the railroads also submitted exhibits showing the *average rate* of return for the railroads of each State from 1921 to 1942, inclusive. These exhibits do not show rates of return for any particular year, but only the average of the same undepreciated base, plus the average of unadjusted cash, materials, and supplies, divided into net railway operating income after all taxes

[10] The exhibits, with references to certain testimony of witness Tassin concerning them, were as follows:

Alabama record: 592–R. II, 882, 720–725.
Kentucky record: 592–R. II, 1285, 1203–1205, 1222.
Tennessee record: 592–R. I, 343, 143–144.
North Carolina record: 561–R. 319, 224–225.

for the 22 years.[11] Thus, the railroads' evidence, like the Commission's decision, attempted to justify wartime increases of fares by averaging in the lower earnings of peacetime years.

The Kentucky proceeding was the only one of the four in which the railroads attempted to show a rate of return for any particular year for the railroads of any one State. From the railroads' exhibit in this case, filed after the hearing (592–R. II, 1327–1334), the Commission calculated the following:

> The relation of net railway operating income to investment in railway property including cash, materials and supplies, for these respondents reflects average rates of return, after Federal income taxes, as follows: 1938, 2.98 percent; 1939, 3.76 percent; 1940, 3.95 percent; 1941, 5.41 percent; and 1942, 5.78 percent. [561–R. 89; 592–R. Vol. I, Ex. B., p. 29.]

This rate base was likewise undepreciated Schedule 211–N, plus unadjusted cash, materials and supplies, divided into net railway operating income after payment of all taxes including Federal income and excess profits taxes. (See footnote 10, *ante*.) The railroads' statistician witness ad-

[11] The average rates of return weighed in proportion to miles operated within the State for the 22 years were:

14 Alabama railroads	3.11% (592-R. II, 883)
7 Kentucky railroads	4.31% (592-R. II, 1287)
12 Tennessee railroads	3.39% (592-R. I, 345)
11 North Carolina railroads	3.00% (561-R. 321)

mitted that 80 percent of the increases of passenger fares would be expended by the railroads in such taxes. (592–R. II, 1215–1216.) Moreover, as was pointed out in the opinion of the dissenting Commissioners, on the basis of the 1940 valuation recommended by the Commission's Bureau of Valuation, the rate of return for these 7 Kentucky railroads would have been 8.15 percent for the year 1942 instead of the 5.78 percent rate accepted in the majority opinion. (592–R. I, Ex. B., p. 46.)

In addition, the record in the Kentucky case contains data from which comparisons of rates of return for the 12 months ended June 30, 1943, may be computed for 6 Kentucky railroads before and after Federal income and excess profits taxes, upon the railroads' undepreciated base and upon the depreciated investment of the respective railroads as of December 31, 1942. Although the lower intrastate fares in the four States were still in force, and the higher interstate fares were only in effect for 9 months of the period, the effect of application of the 1.65 cents fares to both intrastate and interstate traffic for the 12 months ending June 30, 1943 can be judged conservatively by subtracting one-third of the gross passenger revenues[12] from net railway operating income

[12] The amount subtracted to reflect the application of the 1.65 cent fares to all passenger traffic is much more than necessary, for still another reason, namely the fact that passenger service revenues include not only those from the coach service but also those from parlor and sleeping car service and from the mail, express, baggage and milk car services.

before Federal income and excess profits taxes. On the basis of testimony by the railroads' statistician witness that about 80 percent of the increased fares would be paid in Federal income and excess profits taxes, only 20 percent of the amount to be subtracted from net railway operating income before taxes has been taken as the amount to be subtracted after taxes. The following comparisons result:

Comparisons of rates of return—6 Kentucky railroads[1] 12 months ended June 30, 1943

	Rates of Return from—	
	Actual net railway operating income	Net railway operating income less one-third of gross passenger revenues
Depreciated Investment Base:		
Before Federal income and excess profits taxes	18.26%	15.84%
After all taxes	8.12%	7.64%
Railroads' Undepreciated Base:		
Before Federal income and excess profits taxes	14.29%	12.40%
After all taxes	6.35%	5.98%

[1] The railroads' Exhibit No. 19 gives data for 7 railroads (592-R. II, 1327-1 ...), but the exhibit of the Kentucky Railroad Commission, showing gross passenger revenues and net railway operating income after taxes for the 12 months (592-R. II, 1312, 1317) combines these figures for the Illinois Central and the Yazoo and Mississippi Valley; the latter is not included in the railroads' data. Therefore, the Illinois Central figures are excluded, and only 6 railroads are used in the comparisons set forth in the text. For comparison, however, before Federal income and excess profit taxes the rates of return for the 7 Kentucky railroads for the 12 months ended June 30, 1943, were as follows:

Depreciated Investment Base	18.11%
Railroads' Undepreciated Base	12.78%

The 1942 rates of return for the 7 Kentucky railroads, computed by the method described below, except that net railway operating income after all taxes is obtained directly from column 5 of Exhibit 19, were as follows:

	Before Federal income and excess profits taxes	*After all taxes*
Depreciated Investment Base	14.93%	8.19%
Railroads' Undepreciated Base	10.54%	5.78%

These rates of return were computed from the following data: The net railway operating income after taxes for the 6 Kentucky railroads for the twelve months ended June 30, 1943, have been computed from Exhibit ... Sheet 11 (592-R. II, 1317), by subtracting the total for the first six months of 1942 from the total for that year, and adding the total for the first six

months of 1943, resulting in $133,566,688. Net railroad operating income before Federal income and excess profits taxes have been computed by adding the figures of the corresponding railroads for the 12 months ended June 30, 1943, in Exhibit 12, totaling $300,302,(000) (592-R. II, 1321). The railroads' base as of the end of 1942 was obtained by adding columns 4 of Exhibit 19 for the same 6 railroads, totaling $2,101,786,929 (592-R. II, 1327-1333). The depreciated investment base as of the same date was obtained from Exhibit 17 by adding columns 4 and 5 for the same 6 railroads and subtracting column 6, resulting in $1,644,659,(000) (592-R. II, 1325).

Gross passenger revenues for the 12 months ended June 30, 1943, for the 6 Kentucky railroads were obtained by Exhibit 9, by subtracting the first six months of 1942 from the annual figures and adding the amounts for the first six months of 1943, totalling $119,326,904 (592-R. II, 1312). One-third of this amount, $39,775,635, was subtracted from the net railroad operating income of $300,302,(000) before Federal income and excess profits taxes for the same railroads, resulting in $260,526,365. Twenty percent of the amount subtracted, $7,955,127, was subtracted from the net railroad operating income after all taxes of $133,566,688, leaving $125,611,561.

There can be no doubt that these rates of return are unnecessarily high. In *Reduced Rates, 1922*, 68 I. C. C. 676, 683, 734, the Commission reduced railroad freight rates to give the railroads, as a whole, a rate of return of 6.00 percent before deduction of income taxes and 5.75 percent after taxes, despite the fact, of which judicial notice may be taken, that money rates were substantially higher then than now. The Alabama, Tennessee, and North Carolina records show that the railroad rates of return on a depreciated base before income and excess profits taxes would be 18 percent or more for various 12 month periods ended June to October, 1943, as has been shown, *supra*, p. 30; and all four records show that even upon the railroads' inflated and undepreciated base the Class I railroads of the Southern region had a rate of return of 12.23 percent before Federal income taxes or 6.41 percent for 1942 *after all taxes* (*supra*, p. 31). If only normal taxes had been treated as operating expenses, the rate of return on this base, though less than 18 percent, would certainly have been well above 6.41 percent. Clearly, therefore, the railroads

were earning more than the revenues required by law.

2. *The rate base employed by the Commission was excessive.* The base used by the Commission in the computation of the Kentucky rates of return was undepreciated "investment in transportation property used" (Schedule 211–N), plus total cash, materials and supplies unadjusted for working capital purposes. (See footnote 10 *ante.*) In *Charges for Protective Service to Perishable Freight* (1936), 215 I. C. C. 684, 692, the Commission itself has held that "we cannot subscribe to the contention that the investment, unadjusted for the depreciation actually existing in the property, is the proper base upon which to compute a fair return, especially when there is competent evidence in the record from which the present value of the property may be determined. The Supreme Court has repeatedly held that, in the determination of present value, deduction must be made for accrued depreciation. *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 10, *Minnesota Rate Cases*, 230 U. S. 352, 457, 458, *Los Angeles Gas & Electric Corp.* v. *California R. Comm.*, 289 U. S. 287, 312." In a case decided December 4, 1944, Division 3 of the Commission (all of whom were in the majority in the division involved in these appeals) concurred in the propriety of deducting accrued depreciation from the carriers' investment in order to determine

rate of return. *Passenger Fares—Detroit & Cleveland Navigation Co.*, 259 I. C. C. 301, 304.

An illustration of the excessive nature of the railroads' rate base can be derived from a comparison of the base for the Southern region for 1936 (as of December 31, 1936) with that for January 1, 1937, which the Commission found as a "final value" in the *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41, and used as a proper basis for determining rate of return. Each of the four records gives the railroads' base as $3,174,468,831 (see footnote 10 *ante*) for the Class I railroads. This amount is 130 percent of the final value of $2,440,000,000 found by the Commission in that case (226 I. C. C. at 161).

That the railroads' rate base was excessive was demonstrated by us in the course of the proceedings before the Commission. Clearly, therefore, the Commission acted arbitrarily in failing to recognize the inadmissible character of the base and to make determinations accordingly.

3. *Calculation of rate of return after payment of all taxes was not fair or just.* The rates of return for the 7 Kentucky railroads were computed by the Commission after deducting all Federal income and excess profits taxes from net railway operating income. Prior to the hearings in all of these cases, the Commission had consistently held that rates of return should be computed before deducting Federal income taxes. See *Increased Common Carrier Truck Rates in the*

East (1913), 42 M. C. C. 633, 648–649; *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 556; and *Reduced Rates, 1922*, 68 I. C. C. 676, 683. After these hearings, the Commission held in two cases that rates of return should be calculated prior to deduction of excess profits taxes. See *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.* (*1944*), 258 I. C. C. 41, 48–49, and *Passenger Fares—Detroit & Cleveland Navigation Co., supra.*[13] In the cases involved in these appeals, the action of the Commission was inconsistent with all of the above holdings.

In the *Minnelusa* case the Commission stated: "Under all the circumstances, we conclude that it is *not fair or just* that these excess profits taxes [1940 and 1941] should be shifted through rates to the shippers." 258 I. C. C. at 49 [Italics added.] For the Kentucky record the railroads' statistician witness testified that about 80 percent of the increases in the fares would be paid out again in Federal income and excess profits taxes (592–R. II, 1215–1216). The Kentucky Railroad Commission held that under such circumstances, when the railroads did not have present need for the revenues, increases which would benefit the railroads by only 20 percent were not just and

[13] In the latter case, the Price Administrator filed a petition for reconsideration of the decision. While Division 3 of the Commission expressly recognized the rule as stated above, it held that the record did not permit its application.

reasonable (592–R. II, 1072–1074). In none of the cases involved in this appeal did the Interstate Commerce Commission determine whether Federal income or excess-profits taxes, or the wartime portion of such taxes, were just and reasonable expenses to be charged to public through increased passenger fares. *Instead,* the Commission computed the Kentucky rate of return *after all taxes,* and considered figures, in all four records, of net railway operating income and net income *after all taxes* as the basis for its decision in all four cases.

We believe that the Commission's past practice of computing rates of return prior to Federal income taxes is sound.[14] But, in other public

[14] This principle has been followed by the Price Administrator in adjustments of maximum prices. For example, in *Interwoven Stocking Co.* v. *Bowles*, 141 F. 2d 696, the Emergency Court of Appeals upheld the Price Administrator's position that whether a manufacturer was entitled to a price increase should be determined on the basis of his earnings before income and excess profits taxes. The court said (p. 701):

"The complainant also makes the assertion that in addition to the adjustment already discussed the net income shown by its books for 1942 and 1943 should be further adjusted by deducting therefrom the income and profits taxes which it has been required to pay thereon. Its contention is that the portion of its net income remaining after the payment of taxes is the figure which should be compared with its pre-price control net income in order to determine whether it has suffered a hardship under price control. The contention is wholly without merit. If it were accepted the complainant would be accorded the right to escape its share of war-time taxation by passing the burden of its taxes on to its customers in the form of increased prices for its hosiery.

utility cases, where the regulatory authority's practice has been to consider income taxes as expenses, we have urged that this practice be departed from only with respect to wartime taxes, and, with modifications, that limitation has been observed in several instances. See *Re Washington Gas Light Co.*, 46 P. U. R. (N. S.) 1, 11, upheld without discussion of the point by the majority in *Vinson* v. *Washington Gas Light Co.*, *supra*; *Detroit* v. *Panhandle Eastern Pipe Line* (F. P. C.), 45 P. U. R. (N. S.) 203, 219, affirmed without discussion of the point in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n*, 143 F. 2d 488 (C. C. A. 8), certiorari granted, limited, No. 296, this Term; and *South American Rate Order* (F. C. C. Docket No. 6046, Report of June 22, 1943). The Supreme Court of Michigan has recently recognized that the Michigan Public Service Commission is not obligated to allow wartime taxes as expenses. *City of Detroit* v. *Michigan Public Service Commission*, 308 Mich. 706, 14 N. W. 2d 784.

In the *Minnetusa* case the Commission evidently considered itself bound by *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388 and *Georgia Ry. & Power Co.* v. *Railroad Commission*, 262 U. S. 625, to consider "normal" income taxes as

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Certainly neither the Constitution nor the act accords to the complainant any such unique tax exemption."

See also *Jamaica Gas Light Co.* v. *Nixon*, 110 Misc. 500, 181 N. Y. Supp. 623, 627; and *City of Charleston* v. *Public Service Commission*, 95 W. Va. 91.

an expense item to be deducted from income before determining rate of return, although the Commission had distinguished those precedents and held to the contrary in *Increased Common Carrier Truck Rates in East, supra.*[15] Since its decisions cited above, this Court has held that regulatory agencies are "not bound to the use of any single formula or combination of formulae in determining rates. * * * Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *Power Comm'n* v. *Hope Gas Co.* 320 U. S. 591, 602. In clinging to the rule of the *Galveston* case, the Commission seems to have regarded the formula as being of more importance than the end result which exempts railroads from wartime tax burdens and transfers those burdens to travelers and shippers through rate increases of considerable proportions.

If the Commission is now to adopt the rule of excluding only wartime taxes in deference to the *Galveston* case, the fact should be remembered that when that case arose stockholders were exempted from income taxes on dividends, and this Court held that the exemption should be considered in determining the amount of reasonable rate of return. This exemption has been repealed,

[15] In that report the Commission said (42 M. C. C. at p. 649): "We do not agree that the rates of respondents as a whole should be fixed sufficiently high to permit them to pay income taxes, surtaxes, and excess-profits taxes and retain a normal profit."

but if the Interstate Commerce Commission is in effect to reinstitute the exemption by permitting railroads to pass either normal or, as in the present case, both normal and wartime taxes to travelers or shippers, certainly under the *Galveston* case the effect on stockholders' returns should not be neglected. Unless railroad rates of return after income taxes were set at a level sufficiently low so as to reflect this exemption, railroad investors would enjoy a privilege not accorded investors in other industries which must absorb income taxes, and the former would receive higher rates than "commensurate with returns on investments in other enterprises having corresponding risks." *Power Comm'n* v. *Hope Gas Co., supra* (320 U. S. at p. 603).

The Commission itself has pointed out that Federal income taxes are not considered as an expense item for industry generally. In its first decision in *Increased Railway Rates, Fares, and Charges, 1942, supra,* the Commission said (248 I. C. C. at 556):

> We may observe that, while taxes have been deducted in stating net railway operating income in the foregoing table, we have held, *Reduced Rates, 1922,* 68 I. C. C. 676, 683 that—
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> "railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form

of transportation charges adjusted to enable it [them] to retain the designated fair return over and above the tax."

Congress has imposed high wartime taxes upon corporations and individuals not only to provide for war expenditures, but also to suppress inflation by levying upon excessive profits.[16] For railroad rates of return to be calculated after all taxes would be to disregard this Congressional policy. It would necessitate continued increases in railroad rates to maintain undiminished the portion of their earnings left after taxes. The inflationary potentialities of such a course were well explained by Chairman Ayres of the Federal Trade Commission in a letter to the late Senator Norris when the Stabilization Act was under consideration:[17] "if the income taxes so included in

[16] In its report on the Revenue Bill of 1941, the House Committee on Ways and Means reported:

"In its deliberations on this measure, it has been your *committee's aim and desire to distribute the additional tax burden as equitably as possible among the several classes of taxpayers.* Due consideration has also been given to the economic and social effects of the increased levies. There was continually in mind the need for keeping to a minimum, consistent with our defense efforts, any disruption of our economy, and, at the same time, *supplying a needed restraint upon inflationary tendencies.*" (Report No. 1040, 77th Congress, 1st Session, H. R. 5417; p. 2; emphasis added.)

[17] 88 Cong. Rec. 7634–7635. Senator Norris reported to the Senate the Price Administrator's opposition in the Washington Gas Light Co. proceedings before the District of Columbia Public Utilities Commission with respect to

costs are those paid during the operating year on the preceding year's income, the practice would set up a vicious spiral. The greater amount of income taxes paid, the higher would have to be rates of charge in order to afford a gross income that would leave a clear profit in sufficient amount, and the greater would be the current taxable net income; the greater the taxable net income of the current year, the greater would be the amount of income taxes payable in the next year * * *. * * * Inasmuch as one of the purposes for which the Federal Trade Commission was created was to protect the consumer, it deems it appropriate to call the inflationary character of the above practice to your attention."

B. *The evidence of record demonstrates clearly that the lower intrastate fares were adequate.* So long as railroad rates and fares were yielding the carriers higher revenues than *required* to enable them to render adequate and efficient transportation service, the mere fact that the intrastate passenger fares were lower than those on the interstate basis cannot sustain the finding that the former were not contributing a fair share of the revenues which were required. "The mere existence of a disparity between particular rates on

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the calculation of rate of return after wartime taxes, and inserted this letter in the Congressional Record. The position taken by the Price Administrator on the tax point was not criticized in Congress. Instead the proviso to section 1 of the Stabilization Act was promptly added to assure the right of intervention in like cases.

intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." *First Florida Log Case, supra* (282 U. S. at p. 212). See also *Passenger Fares and Charges in Georgia (1936)*, 214 I. C. C. 567, 571. Not only were the records deficient in evidence to show that the intrastate fares were not contributing their fair share of the required revenues, but, on the contrary, all indications of record point unequivocally to the conclusion that the intrastate fares were fully compensatory under wartime traffic conditions.

1. *The Commission had previously found the lower intrastate fares adequate.* In its 1936 decision in *Passenger Fares and Surcharges, supra,* the Commission concluded that fares on the basis of 1.5 cents per mile in the Southern region "are not unreasonable or otherwise unlawful" at the time it reduced fares for railroads in other parts of the country to the basis of 2.0 cents per mile (214 I. C. C. at 257), and in 1942 the Commission authorized increases of 10 percent "to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of" outstanding orders (248 I. C. C. 566). The Commission has not made any finding that fares of 1.65 cents per mile are unreasonably low. Hence one must conclude that, so far as the requirements of Section 15a (2) of the Interstate Commerce Act are concerned, the Commission still considers fares

of 1.65 cents per mile to be within the zone of reasonableness. If coach fares of 1.65 cents per mile satisfy the requirements of Section 15a of the Interstate Commerce Act for interstate traffic, they should also satisfy the requirements of Section 13 (4) with respect to revenue discrimination against interstate commerce, because of the "dovetailed" relationship between those sections;[18] and hence the lower intrastate fares constitute no discrimination against interstate commerce.

This conclusion is emphasized by the provisions of Section 15a of the Interstate Commerce Act which requires consideration, on the one hand, of the public need for rates and fares at the *lowest cost* consistent with the furnishing of adequate and efficient services, and, on the other hand, of the needs of the carriers for revenues to provide such service. The fixing of just and reasonable rates "involves a balancing of the investor and the consumer interests". *Power Comm'n* v. *Hope Gas Co., supra* (320 U. S. at p. 603). Nothing in the report of the Interstate Commerce Commis-

[18] "But we think that the relationship of the section to § 15a (2), already described, is such that the standard of reasonableness prescribed by the latter is that necessarily set up for § 13 (4) which supplements it. The considerations already detailed which define that standard for § 15a necessarily define it for § 13 (3) and (4), which creates a duty in 'dovetail' relationship to that imposed by § 15a." *United States* v. *Louisiana*, 290 U. S. 70, 78.

sion indicates that it balanced these interests by determining whether it should not require maintenance of fares at the *lowest* reasonable *cost* at a time when the railroads did not need the added revenues to earn maintenance and operating costs plus a fair return.

2. *The Commission had already added wartime increases of 10 percent to existing fares.* It may be doubted from the facts already related whether, in the light of operating conditions actually experienced, the 10 percent increase in passenger fares authorized in Ex Parte 148 was needed to provide for increased expenses arising from wartime conditions. However, the States authorized the same 10 percent increases in intrastate fares, and there is no issue in these proceedings as to the propriety of such actions. One can only point out that the increases were granted in 1942 to compensate for anticipated increased expenses over 1941, *Increased Railway Rates, Fares, and Charges, 1942, supra,* 248 I. C. C. 545, 550–552, 606–609, and there is no evidence to suggest that the railroads' wartime needs for added revenues have not been satisfied from this 10 percent increase, without need for further 33⅓ percent increases in Southern passenger coach fares.

3. *Increased wartime traffic has added more to railroad revenues than have the increased rates and fares.* The railroads' own evidence in all four

records shows the following data for Class I railroads in the Southern region: [19]

	Operating Revenues	Operating Expenses (not including income taxes)	Net Railway Operating Income (after taxes)
1941	$698,242,859	$472,968,083	$138,673,394
1942	1,052,924,537	622,964,370	214,151,928

The prior peak for the 22 years shown in the railroads' exhibits came in the years 1926 and 1925 for operating revenues and net railway operating income (after all taxes), respectively. The following figures may be compared with those above:

	Operating Revenues	Operating Expenses (not including taxes)	Net Railway Operating Income (after all taxes)
1925	$846,581,262	$616,488,300	167,565,759
1926	874,464,159	646,031,708	163,046,384

The net railway operating income for 1929, $132,634,559, was less than for 1941 despite lower taxes in 1929.

The great importance of increased wartime traffic to revenues should not be underestimated. For example, in 1936 in *Passenger Fares and Surcharges, supra*, the Commission said (214 I. C. C. at 182):

> Thus, an increase of only 0.79 passenger in the average car occupancy for 1933 of 11.2 in the eastern district would have been sufficient, the average passenger-mile reve-

[19] For references to records see footnote 10, *ante*.

nue and average journey remaining the same, to eliminate the entire passenger deficit of $11,500,400 for 1933 in that district.

By way of comparison, in the cases here on appeal the railroads' evidence shows the following average car occupancies in recent years as compared with 1933:

Revenue passenger-miles per car-mile

	1933	1941	1942	1943
7 Kentucky Railroads (592 R. 11, 1208-1209)	8.3	14.8	23.9	[1] 29.4
6 North Carolina Railroads (561-R. 339-340)	6.83	14.01	23.17	[2] 30.95
12 Tennessee Railroads (592 R. 4, Ex. B., pp. 355-356)	8.17	13.52	22.31	[3] 30.84

[1] 1st 4 mo.
[2] 1st 7 mo.
[3] 1st 8 mo.

The profitability of rail traffic has been increased not only by increased carloadings, but also by a further increase in train loadings, undoubtedly from added cars to trains.[20]

In its report which is the subject of these appeals, the Commission stated that for the year 1943 freight and passenger operating revenues for the Southern region increased 13.3 percent

[20] The revenue passenger-miles per train-mile in 1942 over 1941 increased 91 percent in Kentucky, 94 percent in North Carolina, and 94 percent in Tennessee, as compared with increases of 58, 52, and 62 percents in coach loadings for the same railroads, respectively, and 71, 71, and 73 percents in increased parlor and sleeping car-loadings, respectively. The data from which the percentages were calculated, and annotation to the Record, are set forth in Appendix C to this Brief.

and 67.9 percent over 1942, respectively. (561–R. 79; 592–R. I, Ex. B, p. 16). In the same paragraph the Commission then compared the figures for July and December 1943, evidently for the purpose of showing supposed important declines in net railway operating income and net income, both figures being after taxes. Such comparisons are entirely misleading. The reasons for the unfavorable December "net" figures are the facts that the railroads, (1) like many of us, underestimated their income tax accruals, and (2) paid retroactive wage awards following the incipient strike which caused the Secretary of War to take nominal control over the railroads at the time of the last hearing in these four cases. All of these year-end adjustments were lumped into the December monthly reports to the Commission. Because these facts occurred after the hearings in these cases, the reasons for them are not in the records, except as set forth in the Price Administrator's petition for reconsideration which contains a graph illustrating the obvious unfairness of the comparisons, and the arbitrary nature of the Commission's decision in basing any finding upon such facts (561–R. 436A; 592–R. II, 1124A). The truth is, as shown by the figures set forth above from the railroads' own evidence, that they are now more prosperous, even after all taxes, than at any time prior to this war.

4. *Passenger traffic has long been and still is being subsidized by freight rates.* Passenger service deficits prior to the war are no justification for wartime increases not presently necessary, because the Commission had previously provided for support of the passenger service from freight revenues. For example, in the *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41, the Commission authorized increases of freight rates up to 10 percent, and stated (p. 54):

> This deficit in the passenger traffic as a whole has continued from at least 1926, mounting steadily to a peak in 1932, and receding only slightly thereafter. *Passenger Fares and Surcharges*, 214 I. C. C. 174, 182. The interrelation of the freight and passenger traffic has often been commented on by us, and we have to decline to accede to the proposition again repeated here by certain protestants that we can authorize no increase in freight rates to correct deficiencies in aggregate earnings growing out of the inability of the passenger business to meet its full share of the revenue burden. *Revenues in Western District*, 113 I. C. C. 3, 22–23; *Fifteen Percent Case, 1931*, 178 I. C. C. 539, 565; compare *General Commodity Rate Increases, 1937, supra.*

Since the wartime increase in passenger traffic has made the service profitable, this support from the freight traffic is no longer necessary. Furthermore, the presence of this support factor in

freight rates, multiplied by the wartime increase of freight traffic, has contributed to the extraordinarily high earnings of the railroads. Nevertheless the support factor has been allowed to continue undiminished. Obviously, the subsidy from freight traffic is a factor which the Commission should have taken into consideration in determining whether the carriers presently *require* added revenues to furnish adequate and efficient transportation services.

In its report the Commission disposed of our contention as follows:

> If freight traffic is now producing more than a fair return for the above-mentioned or any other reason, it may be dealt with in an appropriate proceeding. (561–R. 89; 592–R. I, Ex. B, p. 30.)

For the Commission to consider the freight and passenger services and revenues to have an "interrelation" in many prior decisions, and to deny such interrelation in these cases, is another demonstration of the arbitrary and capricious action of the Commission. Contrast with the attitude of the majority the statement of the dissenting Commissioners denying "that there is any deficiency in respondents' revenues from their passenger and freight traffic considered as a whole." (561–R. 102; 592–R. I, Ex. B, pp. 46–47.)

5. *The intrastate fares of 1.65 cents were higher than the cost of the service.* The lower in-

trastate fares were sufficient to cover operating and maintenance costs and yield a profit. The Commission's failure to make a finding on this point makes it necessary to resort to approximate determinations of operating costs from the data of record, but these data are ample to sustain this conclusion.

The average of interstate fares is not as high as 2.2 cents per mile, but is reduced by lower fares, as, for example, the interstate furlough fares of 1.25 cents per mile, considerably less than the intrastate fares on the basis of 1.65 cents per mile. The railroads' evidence in three of the records in these cases shows average revenues per passenger-mile in coaches for 1942 as set forth below. If this figure is multiplied by the average percentage of passenger operating expenses to operating revenues in the same year (the operating ratio), an approximation of the cost of the service may be secured: [21]

	Revenue per passenger mile in coaches, 1942	Passenger Operating ratio, 1942	Approximation of cost per passenger-mile in coaches
7 Kentucky railroads	1.686¢	74%	1.24¢
11 Tennessee railroads	1.697¢	72%	1.22¢
6 North Carolina railroads	1.56¢	63%	.98¢

These cost approximations are undoubtedly too high under present traffic conditions, (1) because

[21] The data, with references to the record, are set forth in Exhibit C to this brief.

of the great increase in travel during 1943, stated by the Commission in its report as increases of 128.5 percent in coaches and 30.2 percent in parlor and sleeping cars for the first 10 months of 1943 as compared with the corresponding period of 1942 (561–R. 78; 592–R. I, Ex. B, p. 15); (2) because the operating ratios of expenses to revenues dropped considerably in 1943, and (3) because the revenues per coach-mile and per parlor and sleeping car-mile increased much more than the revenues per baggage, mail, express, and milk car (see appendix B) all of which are included in the operating ratio of passenger service expenses to revenues. The approximation of costs per passenger-mile in coaches is too high as compared with costs per passenger-mile in parlor and sleeping cars, because the operating ratio is an average for the passenger service as a whole, while coach loadings have increased considerably more than for parlor and sleeping cars.[22]

Operating ratios are themselves indications of the cost of a service. Simply stated, they show

[22] The railroads' evidence in the North Carolina Case shows this fact (561–R. 341, 342). The average passenger miles per coach-mile were 44.96 for the first 7 months of 1943 and 33.62 in 1942, as compared with 23.06 passenger miles in parlor and sleeping cars for the same period of 1943 and 19.45 in 1942. This increase of carloadings was 33.7 percent in coaches as compared with 18.6 percent in parlor and sleeping cars.

the average number of cents spent to earn a dollar. Comparisons of the war years follow:

Passenger service operating ratios

	1941	1942	1943 Estimated
12 Alabama railroads	107	68	(1)
7 Kentucky railroads	115	74	[2] 61.0
6 North Carolina railroads	101	63	[3] 52.3
11 Tennessee railroads	111	72	[4] 56.0

[1] The ratios for the years 1937 to 1942, taken from the railroads' exhibits of record, are set forth in Appendix C. At the Alabama hearing the railroad's statistician witness testified that the figures could not be furnished for any part of 1943 (592-R. II, 749). The ratios were estimated by the OPA witness in the other three cases. The accuracy of the estimates may be judged by the fact that in its decision of December 12, 1944, in Ex Parte 148, the Commission found that the passenger service operating ratios for all Class I Southern railroads was 54.9 percent for the year 1943 (259 I. C. C. 187).

[2] 1st 6 mo. 1943; 10 Ky. railroads (592-R II, 1323).

[3] 1st 9 mo. 1943; 7 N. C. railroads (561-R. 405).

[4] 1st 9 mo. 1943; 8 Tenn. railroads (592-R. I, 411).

Despite these indications, that the lower intrastate fares were sufficient to cover operating and maintenance costs and yield a profit, the Commission did not determine whether the carriers needed the higher fares in order to receive a fair rate of return, and such failure is an error of law. *First Florida Log Case, supra* (see page 28 of this brief).

6. *The State Commissions' findings should have been given weight.* The four State commissions found that the railroads had failed to show the reasonableness of their passenger fare increases in relation to wartime income. Such action was entirely consistent with the finding by the Interstate Commerce Commission in prior deci-

sions that coach fares on the basis of 1.65 cents and 2.2 cents per mile are both reasonable. The Commission gave no presumptive weight, however, to the propriety of the States' regulation of intrastate commerce within this zone of reasonableness for interstate commerce. The Commission has held, therefore, that the railroads have managerial discretion to increase and reduce rates within this zone of reasonableness, but that the States do not have governmental authority over such changes of intrastate rates or fares. Yet the effect of the Commission's decision is to enable the railroads to invalidate State regulation merely by increasing interstate rates or fares, although the intrastate level is within the zone of reasonableness.

We do not believe that the Commission can have appreciated this effect of its order, since to deprive the States of regulatory discretion within the zone of fares recognized as reasonable by the Commission would run counter to the admonition which this Court gave to the Commission in a comparable situation. "Action of the Interstate Commerce Commission in this regard * * * must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 590–1.

III

THE EFFECT GIVEN BY THE COMMISSION TO WARTIME CONDITIONS WAS DIRECTLY OPPOSED TO THE POLICY OF THE STABILIZATION LEGISLATION

(a) So clear is the evidence that no increase in revenues from passenger fares was required that discovery of any explanation for the Commission's crucial fifth finding necessarily turns from present facts to conjecture as to the future. Evidently the possibility of future passenger service deficits, similar to those sustained in the past, weighed heavily with the Commission and also with both District Courts which, misconceiving the nature of the questions raised by the Commission's fifth finding, invoked this ground to defend the *reasonableness* of the interstate fares. But, as has been seen, our position does not oblige them to demonstrate that the interstate fares are unreasonable; the question for decision is only whether additional income from intrastate fares was "necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service". *First Florida Log Case, supra,* 282 U. S. at p. 215.

Even if we were to assume that in peacetime the Commission might override the judgments of State commissions on the basis of a forecast that future revenue losses would render rates or fares unduly discriminatory in the future, certainly

for the Commission to act on any such forecast under present conditions would constitute a disregard of the elementary requirement of the stabilization legislation which is directed at a *present* emergency. The Congress dealt with that emergency positively, and emphatically in the Emergency Price Control Act of 1942, and still more specifically in the Stabilization Act of 1942. The danger against which Congress legislated was inflation and its remedy was stabilization. This remedy is applied to rents, prices, wages, and common carrier and utility rates. Congress recognized the danger as still continuing, and declared its policy of stabilization anew when it enacted the Stabilization Extension Act of 1944 (see footnote 23 *post*).

Obviously it is directly contrary to that policy for any price, wage or rate to be increased now, while the danger of inflation remains acute, in order to protect the beneficiary of the increase against the risk of deflation in the future. The Congress in effect has declared: Stabilize rates now to help prevent inflation now. The Commission in effect has declared: Increase rates now to help prevent deflation in the future. Yet, railroads can benefit from the latter course only because increases in the prices and wages they must pay are being held down and because the purchasing power of the passengers they serve has not been absorbed by mounting prices. If every industry with grounds to fear postwar deflation in

the future had been allowed to increase its prices or rates, ruinous inflation would be here already.[23]

The contention will be raised by appellees that a small increase in the total charge to passengers is not inflationary. For example, in the North Carolina record, the Assistant Passenger Traffic Manager of the Southern Railway System estimated that the average coach journey in North Carolina was approximately 30 miles (561–R. 170), involving a difference of 16 cents between fares of 50 and 66 cents at the rates of 1.65 and 2.2 cents per mile, respectively. The increase is proportionately large; but the fact that the number of pennies may be regarded as small does not render such an increase consistent with the war-

[23] Compare the policy of economic stabilization adopted by the Office of Price Administration approved by the Emergency Court of Appeals as having been given Congressional endorsement by the enactment of the Stabilization Extension Act of 1944. (Public Law 383, 78th Congress, 2d Sess.) In *Gillespie-Rogers-Pyatt Co.* v. *Bowles*, 144 F. 2d 361, 363, that Court quoted the following from a statement made on behalf of appellants to Congress:

"Under this [industry earnings] standard, as a general rule, price increases are allowed to compensate for those cost increases which the industry cannot absorb without impairment of its normal peacetime earnings. As a guide for determining the extent to which price increases are required under this standard, the Administrator uses a representative peacetime period, usually the years 1936–39, the base period adopted by Congress for excess-profits taxes. Where this period is not fairly representative, the years included in the period are varied or other appropriate adjustments are

time stabilization program. "The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral." *United States Gypsum Co.* v. *Brown,* 137 F. 2d 360, 364. See also *Lincoln Sav. Bank of Brooklyn* v. *Brown,* 137 F. 2d 228; and *Philadelphia Coke Co.* v. *Bowles,* 139 F. 2d 349. The Interstate Commerce Commission long ago recognized a similar principle, as, for example, in *Advances in Rates—Eastern Case,* 20 I. C. C. 243, 250.

It was objected in the course of these hearings that the interest of the general public in the proposed advances was but

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made. If, during or subsequent to the year ended October 1, 1944, costs have increased more than gross income, then, to the extent that the industry's earnings, adjusted for changes in investment, provide a smaller return before Federal income and excess-profits taxes than the industry earned in the base period, the Administrator considers an increase in the industry's maximum prices to be required by law."

The quotation by the court, set forth above, was made before the Senate Committee on Banking and Currency. See Senate Rep. 922, 78th Cong., 2d Sess., 45, 47.

As explained in the cited case (144 F. 2d at p. 363), the industry earnings standard is supplemented by a standard which allows an increase in a maximum price of a particular product made by an industry which has satisfactory over-all earnings if the price of the product fails to cover the out-of-pocket cost incurred by the industry generally on that product.

> slight, since the additional transportation charge as applied to a single article would be practically negligible, but the deduction sought to be made from this fact can not be allowed. Whatever is added to the net revenues of these defendants must be paid by someone. An increase of 1 cent per ton in the rate of transportation would hardly be perceptible in case of any commodity, and yet 1 cent per ton upon the total tonnage of the railroads of the United States, as shown by the returns to this Commission for the year 1909 would amount to $8,264,927, which forcibly illustrates the necessity of scrutinizing every advance, no matter how slight.

Here the Commission has found that the increases of intrastate fares which it has required in the four States will amount to at least $2,275,000 per year.

The Commission is not free thus to disregard the national stabilization policy. Not only in the administration of the Interstate Commerce Act must the Commission give proper consideration to the policies embodied in other acts of Congress, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80; *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31; but the Commission has been admonished by this Court that it has a duty to "give full effect to wartime conditions and the stabilization legislation." *Inter-*

state Commerce Commission v. *Jersey City*, 322 U. S. 503, 519. Compliance with that duty precludes it from requiring rates to be increased now on the ground that the higher rates may be needed in the future.

The Commission's action was entirely contrary to the statements in *Increased Railway Rates, Fares, and Charges 1942, supra*, 255 I. C. C. at 392, that: "The Interstate Commerce and the Price Control and Stabilization Acts declare important congressional policies which are not contradictory, but are complementary. In the administration of the Interstate Commerce Act, we give consideration, when applying the standards of lawfulness of charges made under that act, to the fact that for a Nation at war a major problem is to prevent undue inflation of prices." The Commission also said, in *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723, 735: "We can see no material difference between the concept of gross inequities and that contemplated by section 13 of the Interstate Commerce Act insofar as revenue discrimination against interstate commerce is concerned."

We agree that the rate making policies of the Interstate Commerce Act and the Price Control and Stabilization Act are complementary. We do not oppose increases of rates, fares, or charges, therefore, if such level of rates is below a rea-

sonable minimum,[24] or if the carriers need additional revenues in order to provide adequate and efficient transportation services during the war, or if the increases are otherwise necessary to aid in the effective prosecution of the war or to correct those gross inequities which constitute *undue* and *unreasonable* advantages, preferences, prejudices, and discriminations.[25] But, as we have shown, the Commission has not required the carriers to demonstrate that higher fares were required to provide a needed increase in revenues. Certainly the mere fact that intrastate fares are lower than interstate fares, when the former are not shown to be yielding revenues less than those required to provide adequate and efficient service, cannot be regarded as giving rise either to a gross inequity or to an undue or unreasonable discrimination.

In the instant cases, however, when faced with our contention that the increases of intrastate fares were inconsistent with the wartime stabilization program, the Commission merely pointed

[24] Section 15a of the Interstate Commerce Act required that the Commission give consideration in its determination of the reasonableness of rates "to the need, in the *public interest*, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service."

[25] Just as Section 1 of the Stabilization Act of 1942 provides for adjustments in prices to correct *gross* inequities, so the Interstate Commerce Act, in Section 13 (4), provides for adjustments to remove *undue* or *unreasonable* advantages, preferences, prejudices, and discrimination.

to a prior statement that the provisions of the Price Control and Stabilization Acts, except those pertaining to the giving of notice and consent to intervene, "made no changes in the Interstate Commerce Act." The Commission then found that proper notice and consent had been given (561–R. 91–92; 592–R. I, 32–33). Apparently the Commission considered that in making this finding it had discharged its duties under the stabilization legislation. But the form cannot thus take the place of substance; the Commission's obligation remains "to give full effect to wartime conditions and the stabilization legislation." *Interstate Commerce Commission* v. *Jersey City, supra.*

(b) The Commission's disregard of its obligation to give effect to the stabilization legislation is aggravated by reason of its concurrent disregard of its duty, as declared in the statement of National Transportation Policy in the Interstate Commerce Act, "to cooperate with the several States and the duly authorized officials thereof," and its duty, as declared by this Court, to "show meticulous respect for the interests of the States." *Yonkers* v. *United States*, 320 U. S. 685, 690.

The considered decisions of the four State commissions in this case gave effect to the President's request that State authorities prevent intrastate rate increases inconsistent with the wartime stabilization program. Indeed, the Kentucky

Railroad Commission quoted this request as one of the bases for its action (592–R. II, 1071):

> The attention of all agencies of the Federal Government, *and of all State and municipal authorities*, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state, or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program. (Executive Order 9328, 8 F. R. 4681; italics added).

If sustained, the Commission's action in compelling the fares to be increased, which the State authorities had stabilized, will inevitably and seriously discourage equal vigilance in the future on the part of these and other State and local authorities.

(c) Even if the Commission might in a proper case base a Section 13 (4) order on a finding as to future rather than present revenue requirements, the present case would not provide a proper occasion for such an action.

The Commission has recognized that the high level of passenger revenues is attributable to wartime conditions. In a concluding paragraph in the section of its report on the "Level of the

Interstate Fares," the Commission declared (561–R. 81; 592–R. I, Ex. B, p. 19):

> The large increase in the passenger traffic and revenues of these respondents in the last 2 years, over the years prior to 1942 when they were incurring deficits from their passenger operations, was similar to that in the same years on practically all of the railroads in the country. The important facts in that respect differ little from those found in our report on further hearing in Ex Parte 148. We there pointed out that many of the factors making for increased passenger travel apparently would continue in 1943, such as inductions into the armed forces of great numbers of persons and the travel of men and women in the armed services and their relatives, together with greatly increased movements of Army troop trains. The prospect of further increases in rail passenger traffic and revenues was thus recognized and considered by us in reaching our conclusion that no modification of our previous findings, orders, and authorizations respecting these fares was necessary.

If there is to be deflation in the postwar period, as the Commission and the District Courts seem to have assumed, then the increase in intrastate fares which the Commission is now compelling will not then be of value to the railroads here concerned. Their own experience in the pre-war deflationary period established clearly

that the 1.5 cents fare was more remunerative than the 2.0 cents fare. Hence the Commission's action cannot be justified on the score that it was simply anticipating the proper level of peacetime intrastate rates so as to provide the required volume of peacetime revenues. Once this fact is recognized, it becomes apparent that what the Commission's action amounts to is an authorization, over the objections of the State commissions having jurisdiction and the agencies of the Federal government responsible for the stabilization of prices, to the railroads to exploit the temporary shortage of competing means of transportation and thus recoup for past passenger service deficits and accumulate a surplus against the risk of future passenger service deficits.

Although the railroad freight rate structure has long included a support factor to sustain the deficits incurred in railroad passenger service, it is not unnatural that railroad managements should desire to better their past records by charging what the wartime passenger traffic would bear. But the desire to increase rates and prices under wartime conditions is one of the principal reasons why wartime stabilization legislation is an economic imperative. Certainly no regulatory authority should recognize such a basis for permitting increases not presently necessary. Still less should the Commission's action override the considered judgments of four State commissions

when, as the dissenting Commissioners Splawn, Aitchison, and Mahaffie said (561–R. 102; 592–R. I, Ex. B, p. 46):

> It does not affirmatively appear on this record that fares based on the lower intrastate level applied to both interstate and intrastate traffic would be less than required to enable respondents to render the character of service contemplated by Section 15a.

CONCLUSION

For the foregoing reasons, the judgments of the courts below should be reversed with directions to set aside the order of the Commission.

Respectfully submitted,

RICHARD H. FIELD,
General Counsel,
DAVID F. CAVERS,
Assistant General Counsel,
MALCOLM D. MILLER,
Chief Counsel, Common Carrier Section,
Office of Price Administration.

I have authorized the filing of this brief.

CHARLES FAHY,
Solicitor General.

APRIL 1945.

APPENDIX A

CORRECTED ORDER

(561–R. 507; 592–R. I., Ex. B., p. 1)

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of May, A. D. 1944.

No. 28963

ALABAMA INTRASTATE FARES

No. 29000

KENTUCKY INTRASTATE FARES

No. 29036

NORTH CAROLINA INTRASTATE COACH FARES

No. 29037

TENNESSEE INTRASTATE FARES

These proceedings having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission, on March 25, 1944,

having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and

It appearing, That as set forth in said report, and in accordance with the practice in such proceedings, the Commission left to respondents herein and the respective State Commissions, for a period of 30 days from March 30, 1944, the date of service of said report, the matter of adjusting the intrastate passenger fares under consideration in these proceedings to conform to the findings and conclusions made in said report, and that no such adjustment of the said intrastate fares has been made or authorized by the respective State Commissions:

It is ordered, That respondents in each of these proceedings, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before July 1, 1944, upon notice to this Commission and to the General public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to abstain, from practicing the undue prejudice and preference and the unjust discrimination found in said report to exist.

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before July 1, 1944, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and

apply, passenger fares for intrastate transportation in the respective States which shall be on bases no lower than the passenger fares presently maintained and applied by the respective respondents for like accommodations in interstate transportation to, from, and through the respective States; provided, that the resulting aggregate charge made by any of said respondents for intrastate transportation in any of the States shall not exceed the aggregate charge made for like accommodations and for a like distance by the same respondent in interstate transportation to, from, or through such State.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

APPENDIX B

STATUTES INVOLVED

SECTION 13(4) OF THE INTERSTATE COMMERCE ACT

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a OF THE INTERSTATE COMMERCE ACT

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

SECTION 1 (a) OF THE EMERGENCY PRICE CONTROL ACT OF 1942

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pen-

sions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

SECTION 1 OF THE STABILIZATION ACT OF 1942

In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this

Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

APPENDIX C

Abstract of Data Showing Passenger Traffic and Revenue Trends

7 KENTUCKY RAILROADS

[Railroads Exhibit No. 6]

Year	1937	1938	1939	1940	1941	1942	1st 4 mo. 1943
Revenue Passenger Miles per Train Mile (592-R. II, 1296-7)	48.3	39.4	43.9	48.6	62.7	119.7	162.5
Passenger Miles per Car Mile:							
In Coaches (592-R. II, 1299)	15.60	12.33	14.25	15.77	19.53	30.85	.....
In Parlor and Sleeping Cars (592-R. II, 1300)	9.37	8.78	8.61	8.91	10.75	18.38	.....
Revenue per Passenger Mile:							
In Coaches (592-R. II, 1291)	1.517¢	1.772¢	1.482¢	1.437¢	1.506¢	1.686¢	.....
In Parlor and Sleeping Cars (592-R. II, 1292)	2.308¢	2.346¢	2.396¢	2.294¢	2.333¢	2.567¢	.....
Revenue per Car Mile:							
In Coaches (592-R. II, 1292)	23.65¢	21.85¢	21.12¢	22.66¢	29.41¢	52.02¢	.....
In Parlor and Sleeping Cars (592-R. II, 1293)	21.63¢	20.50¢	20.63¢	20.32¢	25.08¢	47.17¢	.....
Revenue per Baggage, Mail, Express and Milk Car (592-R. II, 1291)	26.20¢	25.46¢	25.35¢	25.27¢	25.96¢	28.44¢	.....
Index of Tax Accruals Passenger (1936=100) (592-R. II, 1293)	103	107	115	138	201	494	.....
Operating Ratios (592-R. II, 1289):							
Passenger	130%	131%	132%	136%	115%	74%	.....
Freight	63%	62%	61%	60%	57%	50%	.....

6 NORTH CAROLINA RAILROADS (EXCEPT AS INDICATED)

[Railroads' Exhibit No. 9]

Year	1937	1938	1939	1940	1941	1942	1st 7 mo. 1943
Revenue Passenger Miles per Train Miles (561-R. 335-6)	47.53	37.60	46.16	53.75	75.11	145.85	211.10
Passenger Miles per Car mile:							
In Coaches (561-R. 341)	14.74	10.81	14.46	17.11	22.05	33.62	44.96
In Parlor and Sleeping Cars (561-R. 342)	9.82	9.37	9.02	9.32	11.36	19.45	23.06
Revenues per Passenger Mile (561-R. 328):							
In Coaches	1.494¢	1.806¢	1.395¢	1.362¢	1.403¢	1.560¢	.....
In Parlor and Sleeping Cars) (5 railroads)	2.286¢	2.399¢	2.405¢ (4 railroads)	2.351¢	2.448¢	2.604¢	.....
Revenue per Car Mile (561-R. 329):							
In Coaches	22.02¢	19.51¢	20.17¢	23.30¢	30.98¢	52.44¢	.....
In Parlor and Sleeping Cars (5 railroads)	22.44¢	22.48¢	21.68¢ (4 railroads)	21.91¢	27.79¢	52.40¢	.....
Revenue per Baggage, Mail, Express and Milk Car (10 North Carolina Railroads) (561-R. 327)	24.84¢	24.39¢	24.44¢	23.58¢	24.44¢	25.92¢	.....
Index of Tax Accruals Passenger (1936=100) (561-R. 330) (11 railroads)	112	114	118	136	227	607	.....
Operating Ratios (561-R. 324):							
Passenger	117%	125%	124%	123%	101%	63%	.....
Freight	67%	67%	64%	64%	60%	55%	.....

11 TENNESSEE RAILROADS (EXCEPT AS INDICATED)

[Railroads' Exhibit No. 6]

Year	1937	1938	1939	1940	1941	1942	1st 6 mo. 1943
Revenue Passenger Miles per Train Mile (592-R. I, 353-4)	46.14	37.55	41.73	45.78	61.81	119.94	189.11
Passenger Miles per Car Mile:							
In Coaches (592 R. I, 356)	14.01	10.80	12.39	13.89	17.60	28.51	.....
In Parlor and Sleeping Cars (592-R. I, 357)	9.32	8.82	8.61	8.73	11.07	19.12	.....
Revenue per Passenger Mile:							
In Coaches (592-R. I, 348)	1.524¢	1.774¢	1.477¢	1.446¢	1.515¢	1.697¢	.....
In Parlor and Sleeping Cars (592-R. I, 349)	2.246¢	2.311¢	2.358¢	2.300¢	2.285¢	2.483¢	.....
Revenue per Car Mile:							
In Coaches (592-R. I, 349)	21.35¢	19.15¢	18.59¢	20.09¢	26.66¢	48.36¢	.....
In Parlor and Sleeping Cars (592-R. I, 350)	20.94¢	20.38¢	20.30¢	20.12¢	25.29¢	47.47¢	.....
Revenue per Baggage, Mail, Express and Milk Car (592-R. I, Ex. B, p. 348)	25.44¢	24.09¢	24.12¢	24.57¢	25.36¢	27.71¢	.....
Index of Tax Accruals Passenger (1936=100) (592-R. I, 351)	103	119	117	119	126	331	.....
Operating Ratios (592-R. I, Ex. B, p. 348):							
Passenger	124%	131%	132%	133%	111%	72%	.....
Freight	68%	66%	65%	64%	60%	58%	.....

13 ALABAMA RAILROADS (EXCEPT AS INDICATED)

Year	1937	1938	1939	1940	1941	1942
Passenger Train Revenue per Passenger-Carrying Car-Mile (592-R. II, 874)	15.72¢	14.65¢	14.56¢	15.41¢	19.98¢	36.54¢
Revenue per Passenger-Mile in Southern Region 592-R. II, 1046-A):						
In Coaches	.....	.....	.....	.....	1.45¢	1.61¢
In Parlor and Sleeping Cars	.....	.....	.....	.....	2.37¢	2.58¢
Revenue per Baggage, Mail, Express and Milk Car (592-R. II, 875)	23.61¢	22.08¢	22.06¢	21.89¢	23.76¢	25.74¢
Index of Tax Accruals (14 railroads) (1936=100) 592-R. II, 876	105	113	118	129	202	495
Operating Ratios (12 railroads):						
Passenger (592-R. II, 879)	121%	128%	128%	127%	107%	68%
Freight	69%	68%	66%	67%	62%	58%

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 561.

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., *Appellees*.

On Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

FRANK W. GWATHMEY,
JOSEPH P. COOK,
CHARLES CLARK,
Attorneys for Aberdeen and Rockfish Railroad Co., et al., Appellees.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Appeal from the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

BRIEF ON BEHALF OF ABERDEEN AND ROCKFISH RAILROAD CO., ET AL., APPELLEES.

OPINIONS BELOW.

The opinion of the specially constituted District Court of the United States for the Eastern District of North Carolina, Raleigh Division, in No. 189 Civil, *State of North Carolina* v. *United States*, appears in the Record at pages

549-574; its findings of fact and conclusions of law appear at pages 546-547; its decree thereon entered appears at page 545; and reported 56 F. Supp. 606.

The order of the Interstate Commerce Commission which gave rise to the proceedings in the District Court appears at pages 507-508 of the Record; the report of the Commission upon which said order was made appears in the Record at pages 69-96; and is reported 258 I. C. C. 133, entitled *Alabama Intrastate Fares.*[1]

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 47(a) and 345, wherein a direct appeal to this Court is authorized from a final decree of a specially constituted District Court of the United States, made pursuant to the provisions of Title 28, U. S. C., Sections 41 (28), 43-48, and Title 49, U. S. C., Section 17 (19), in a case brought to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission (herein called I. C. C.), other than for the payment of money.

Appellant Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, hereinafter called Price Administrator, filed his motion for leave to intervene as a party plaintiff (R. 37) and in that connection filed what he termed his complaint or petition (R. 38-54) wherein, in addition to seeking the injunctive relief sought by the State of North Carolina and its Utilities Commission, he sought a trial *de novo* in said Court in respect of the allegations of paragraph 16 of his complaint or petition (R. 48-49). His

---

[1] The report and subsequent order of the Interstate Commerce Commission embraced four proceedings; one involving passenger fares within the State of North Carolina here immediately involved, Docket 29036, and three other similar and separate proceedings involving passenger fares within each of the States of Alabama, Docket 28963, Tennessee, Docket 29037, and Kentucky, Docket 29000. While there were four separate proceedings, the I. C. C.'s decision was embraced in one report and order.

motion to intervene recited it was filed under authority of Title 28, United States Code, Section 45a (R. 37). This appellant was granted the right to intervene as a plaintiff in this suit (R. 37-38).

The North Carolina rail lines (appellees here), upon whose petition the I. C. C. instituted the proceedings giving rise to the order here involved, duly intervened as parties defendant in the District Court under authority of Title 28, U. S. C., Section 45a (R. 107-109).

The final decree of the District Court was entered on the twentieth day of July, 1944 (R. 545). The petition for appeal was presented and allowed on the eighteenth day of September, 1944 (R. 587). Probable jurisdiction was noted by this Court on the thirteenth day of November, 1944 (R. 596).

THE STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, Part I, as amended; particularly its provisions relating to prescription of reasonable rates (Title 49, U. S. C., Section 15(1)) for the transportation of persons in the light of what is known as the "rule of rate making" (Title 49, U. S. C., Section 15a (2), 54 Stat. 912), and the "national transportation policy" (Title 49, U. S. C., notes preceding Section 1, 54 Stat. 899); and more especially involved is the application of the Federal statute (Title 49, U. S. C., Section 13(3) (4)) to remove any unreasonable preference or prejudice as between persons in intrastate and interstate commerce, or any unreasonable discrimination against interstate commerce. These sections of the Act are set out in Appendix A to our brief in No. 560, *State of North Carolina* v. *United States*, pending in this Court.

Section 13(4) together with extracts from Emergency Price Control Act of 1942 (56 Stat. 23, 36) and from Stabilization Act of 1942 (56 Stat. 765), here immediately involved, are set out in an appendix hereto. We quote therefrom for more convenient reference.

Interstate Commerce Act, Part I, Section 13(4) declares:

> "Whenever . . . the Commission . . . finds that any such rate . . . causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, . . . thereafter to be charged . . . in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination . . . the law of any State or the decision or order of any State authority to the contrary notwithstanding." (49 U. S. C. Sec. 13(4).)

Emergency Price Control Act of 1942 (Section 302(c)) declares: "That nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . ." (56 Stat. 23, 36; 50 U. S. C., Sec. 942(c)).

Stabilization Act of 1942 declares that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase" (56 Stat. 765; 50 U. S. C., Sec. 961).

STATEMENT OF THE CASE.

This appeal brings up for review the decree (R. 545) of the statutory three-judge District Court wherein the order (R. 507) of the Interstate Commerce Commission was upheld. The I. C. C. ordered appellees (North Carolina rail lines) to increase their civilian[2] coach-fare rates within the

[2] Confined to "civilian" because the lower charges paid by United States Government for troop movements and the 1.25 cent fares maintained for service men and women traveling on furlough or within thirty days after their discharge from the service are not here involved.

State of North Carolina from 1.65 cents to 2.2 cents per mile, that is to say, from the basis or level required by the North Carolina Utilities Commission to the interstate level of such fares prescribed by the Interstate Commerce Commission for general application. The order so upheld also required the round-trip fares for civilian travel in coaches over the lines of these appellees in North Carolina to be increased from amounts, with varying limits, to the uniform basis of 1.98 cents per mile, good for three months, that is, to be the same as the interstate level. The round-trip rate of 1.98 cents per mile is less than the one-way rate of 2.2 cents per mile. It is unnecessary to discuss the lower round-trip rate.

It was following the failure and refusal of the North Carolina Utilities Commission in its order of July 8, 1943, No. 2789 (R. 128-140), to authorize the increase in passenger fares just stated that rail carriers operating in North Carolina, except the Norfolk and Western Railway Company, filed their petition with the I. C. C. (R. 121). It thereupon instituted an investigation of these intrastate fares under the provisions of Title 49, U. S. C., Section 13 (3) (4). The Norfolk and Western Railway Company was not a petitioner before the North Carolina Utilities Commission. It was not a party to the petition to the I. C. C. That was because it already had in effect coach fares of 2.2 cents per mile applicable intrastate on its two lines in North Carolina, one to Winston-Salem and the other to Durham, aggregating approximately 100 miles of railroad within the state. The I. C. C. instituted the investigation by its order dated October 13, 1943, wherein the rail lines, appellees here, were made respondents (R. 141). After a full hearing, it entered the order against respondent rail lines directing that their intrastate coach fares in North Carolina be raised uniformly to the level of the prevailing interstate fares (R. 507). The report and order of the I. C. C. must be read together. *Georgia Comm. v. United States*, 283 U. S. 765, 771.

Upon making a general investigation of interstate passenger fares throughout the country, the I. C. C. in *Passenger Fares and Surcharges*, 214 I. C. C. 174 (1936), found reasonable for general application a rate of 2 cents per mile in coaches in lieu of 3.6 cents, and found reasonable 3 cents per mile in sleeping and parlor cars in lieu of 3.6 cents per mile plus 50 per cent of the charge then generally in effect for sleeping or parlor car space occupied.

In *Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, the I. C. C. authorized the aforesaid 2-cent rate increased to 2.2 cents and 3 cents to 3.3 cents. (The latter is not here involved.) (R. 521.) This authority, with certain increases in freight rates also therein sanctioned, was granted to enable the railroads to maintain adequate transportation service during the national emergency. These increases were limited to the period of the emergency, that is, until six months after termination of the present war (248 I. C. C., 613). The 2.2-cent fares were made effective interstate February 10, 1942. The railroad regulatory bodies of forty-four states sanctioned the 2.2-cent coach fare for intrastate application in their respective states. Four states refused, North Carolina here immediately involved and Alabama, Tennessee, and Kentucky, whose appeal from a decree of a statuory three-judge District Court of the United States for the Western District of Kentucky, Louisville Division (56 F. Supp. 478), is now before this Court in No. 574, *State of Alabama, et al., Appellant*, v. *United States, et al., Appellees*, October Term, 1944. Separate thirteenth-section proceedings were had before the I. C. C. as to each state's rates and separate hearings were held, but they were argued together before the I. C. C. and one report (258 I. C. C. 133) and order was issued to cover all four proceedings. (R. 69, 507.)

A chronological history of the background of this case was submitted as Appendix B to our brief in No. 560, *State of North Carolina* v. *United States*.

The Price Administrator in the Court below sought to set aside and annul the order of the I. C. C. (R. 507) because the I. C. C. in its said order failed "to accommodate the exercise of its powers to the Congressional policies embodied in the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942" (R. 54). It here assigns error to the District Court "in concluding that there was substantial evidence of record to sustain, consistently with the Commission's duty to give full effect to wartime conditions and the stabilization legislation" (R. 587).

ARGUMENT.

The I. C. C. Made Appropriate Findings on Substantial Evidence and Gave Full Consideration to the Representations of the Price Administration.

This appeal is a companion appeal to that of the State of North Carolina, et al., No. 560, now pending in this Court. In the state's appeal, the same question of lack of substantial evidence to support the order of the I. C. C. was made. We have filed in Docket No. 560 a brief in which we have painstakingly reviewed the findings of the I. C. C. and pointed out the evidence of record in support thereof. This was set out in further detail in Appendix D bound separately and filed with that brief. This broad contention is discussed in our brief in No. 560 at pages 18-20; the findings and supporting evidence in respect of the reasonableness of coach fares on basis of 2.2 cents per mile are discussed at pages 21-34; the findings of preference or prejudice as between intrastate and interstate passengers and the supporting evidence are discussed at pages 34-42; and the findings of unlawful discrimination against interstate commerce and the supporting evidence are discussed at pages 42-48.

The District Court, in a well-reasoned opinion by Circuit Judge Parker, upheld the order of the I. C. C. and dismissed the suit, 56 F. Supp. 606 (R. 548). In that opinion, the

District Court dealt at some length with the contentions of the Price Administrator, (56 F. Supp., 620; R. 570-572). Of the Price Administrator's contention that adequate consideration was not given by the I. C. C. to his representations, Judge Parker said:

> "* * * The record shows that full consideration was given the representations of the Price Administrator, both in the hearings in Ex Parte No. 148 and in the hearing which resulted in the order here involved."

Judge Parker then referred (R. 570) to the fact that the I. C. C., in the reopened *Ex Parte 148* proceeding, pointed out in its report and order of April 6, 1943, why the passenger-fare increase was continued while certain freight increases were suspended, citing 255 I. C. C. 357, 394-395. We quote the I. C. C. from those pages as follows:

> "The situation regarding standard passenger fares differs from that as to freight rates and charges in important respects. As we have previously shown, the evidence herein discloses that passenger traffic failed for many successive years to pay its proper share of railway expenses, and that only with the large volume of traffic and passenger revenue was the 1942 passenger deficit currently eliminated. Even with that increased volume of traffic and revenue, as shown by the reports for 1942 and the current reports so far made this year, the operating ratio remains decidedly less favorable for passenger and allied services than for freight.
>
> "Fares applicable in sleeping and parlor cars on the present level of 3.3 cents per mile are only slightly higher than the 3-cent basis in effect prior to 1920, and are materially lower than the 3.6-cent fare plus the surcharges that became effective in that year. Interstate coach fares on the present basis of 2.2 cents per mile are 26 percent lower than the 3-cent level prevailing interstate during and before World War I. The actual revenue collected per passenger-mile is considerably below the standard rate of fare, and is influenced by the reduced and special fares accorded, certain of which have been previously discussed, and by the appli-

cation of direct-line fares over circuitous routes. The actual revenues per passenger-mile, all classes including commutation, collected in the years 1921-27, ranged from 3.086 to 2.896 cents. Excluding commutation traffic, the revenues per passenger-mile were 1.90, 1.87, and 2 cents for 1940, 1941, and 1942, respectively.

"Governmental authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or is for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel." (255 I. C. C., 394-395.)

Judge Parker then went on to quote from the report of the I. C. C. which accompanied its order here assailed (56 F. Supp., 620; R. 570-571), wherein the I. C. C. had referred to its consideration of the contentions of the Price Administrator in its report in *Increases in Texas Rates, Fares, and Charges,* 253 I. C. C. 723. Of that decision of the I. C. C., Judge Parker went on to say:

"An examination of the report in Increases in Texas Rates, Fares and Charges, 253 I. C. C. 723, 734-736, referred to in the above quotation, shows that the Commission was fully aware of its duty under the Stabilization Act and was discharging it in accordance with the spirit as well as the letter of that act. What weight was to be accorded the contentions advanced by the Price Administrator pursuant to the act, was a matter committed to the discretion of the Commission; and the right to review the exercise of that discretion is given neither to the Price Administrator nor to this Court. Whatever question might have existed with regard to this was set at rest by the recent decision of the Supreme Court in the Jersey City case (322 U. S. 503, 522-523), where Mr. Justice Jackson, speaking for the Court, said:

"'The Interstate Commerce Commission has responsibility for maintaining an adequate system of

wartime transportation. It is without power to protect these essential transportation agencies from raising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. * * * The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. *We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court to determine.* . . . If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals.' " (Emphasis supplied by Judge Parker. 56 F. Supp., 620; R. 571-572.)

Since the decree of the District Court was rendered, the I. C. C. has once more considered the representation of the Price Administrator that the passenger-fare increase is incompatible with the Emergency Price Control Act as amended by the Stabilization Act. In its fifth and last report on further hearing in *Ex Parte 148*, dated December 12, 1944, and reported 259 I. C. C. 159, the I. C. C. meticulously reviewed and considered all of his representations and contentions. Passenger traffic was particularly discussed at pages 186-189, and at page 189 the I. C. C. said:

"The Price Administrator again raises the issue that the increases in freight rates authorized and now under suspension and the increases in standard passenger fares should be ordered removed upon the ground

that they are inconsistent with the national effort to control inflation. That matter was fully discussed and considered in our report on further hearing in this proceeding, 255 I. C. C. 357, 368. We adhere to the views there expressed."

From the foregoing, it appears beyond any question that the findings of the I. C. C. are supported by substantial evidence, that it received and thoroughly considered the representations of the Price Administrator in the proceeding before it, and that the same were fully reviewed and considered by the District Court. The Price Administrator has had his day in court and is entitled to no more.

The Price Administrator, Being Unable to Offer Proof of Possible Inflation, Has Taken an Unsound Position with Respect to Railroad Earnings.

The assignment of error (R. 587) and point relied on (R. 592) by the Price Administrator comes to this: The Price Administrator differs with the I. C. C. over the revenue needs of the rail lines. The Price Administrator believes their earnings, without the passenger-fare increase here involved, would be adequate. From that he argues that the I. C. C. may not require the North Carolina intrastate coach fares be increased to the interstate level. The argument of the Price Administrator is unsound. It inevitably leads to the ultimate conclusion that so long as the rail lines are earning anything, the principles embodied in Section 13(4) may not be invoked. In a word, an increase which would increase revenue, of which the rails may not at the moment be in dire need, could not be prescribed.

The answer to that proposition is extremely simple and has heretofore been made in our brief in the North Carolina case, No. 560. It is this: The statute confides to the I. C. C. the authority and duty to determine this very question and, having determined it on substantial evidence submitted and in the light of appropriate procedural steps, neither the Price Administrator nor a court may properly

substitute his or its judgment in the premises for that announced by the I. C. C. Any other course would, quite obviously, defeat the purpose of the Federal statute and would tie the hands of the I. C. C. in performing the duty which the statute lays upon it. That is to say, to so regulate the matter of rates that the revenues therefrom shall be sufficient to maintain a national transportation system, adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

Stated somewhat differently, the position of the Price Administrator is this: Unless the railroads of the country are in or upon the verge of bankruptcy, the I. C. C. may not function under the terms of Section 13, paragraphs 3 and 4. The authority and duty of the I. C. C. in the premises may not be throttled by any such narrow concept of the purpose of the Congress in enacting Section 13.

One might as well argue that the authority reposed in the I. C. C. to authorize abandonment of a line of railroad (Section 1, paragraph 18)[3] could never be invoked and exercised unless the applicant railroad was in receivership or bankruptcy or so nearly so as to substantially amount to the same thing. The authority granted in respect of abandonments is to overcome an undue burden upon interstate commerce by reason of the continued operation of unprofitable rail lines. It is quite obvious that a railroad company may be highly prosperous and enjoy substantial income and yet have some one or more branch lines on which the traffic has completely dried up and disappeared. Surely it would be idle to argue that the I. C. C. could not authorize the abandonment of such a hopelessly unprofitable line merely

[3] Section 1(18) provides for a certificate of convenience and necessity in respect of extensions of a line of railroad "and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." (Title 49, U. S. C., Section 1 (18).)

because the operations of the applicant, as a whole, show an income, indeed, even a substantial income.

The question whether the present earnings of the railroads are or are not excessive is not one for determination by the Price Administrator or by the courts. By the express terms of the Interstate Commerce Act (Section 15a (2)), the power and duty is imposed upon the I. C. C., in prescribing just and reasonable rates, to give due consideration to "the need of revenues sufficient to enable the carriers, under honest, economical and efficient management" to provide, in the public interest, "adequate and efficient railway transportation service." Upon consideration of the latest available reports of railroad earnings, the I. C. C. has found and declared in *Ex Parte 148* that present revenues, including the revenue derived from passenger fares, are needed for such purpose and "will meet the objectives of the national transportation policy as defined in the Interstate Commerce Act, and the standards of section 15a (2) thereof" (255 I. C. C. 393). It has reaffirmed this finding at as late a date as December 12, 1944, in the fifth report in *Ex Parte 148* (259 I. C. C. 159). Such finding by the I. C. C., supported as it is by substantial evidence, may not be set aside by the courts.

It is not without significance that this insistence of the Price Administrator that his voice should control in this matter is a belated effort—an afterthought. The I. C. C., in *Increases in Texas Rates, Fares, and Charges*, 253 I. C. C. 723 (December 18, 1942), pointed out at page 732:

> "At the hearing in Ex Parte No. 148, the Price Administrator did not offer any evidence and did not oppose the increases there sought by the carriers, but, after our decision in that proceeding, he filed a petition seeking suspension of the approved increase on 10 specified commodity groups. The petition was denied. Following discussion with the Price Administrator's staff and others, the carriers undertook to set up a committee composed of traffic executives for the purpose of receiving and passing upon requests by

shippers and by State and Federal agencies for readjustments in rates which might be necessitated by more extensive consideration of the rates on particular traffic or by changed conditions. At the hearing in the instant proceeding in August 1942, the Price Administrator offered certain economic testimony indicating the importance of the price-control program and stressing the point that, as the industrial plant of the Nation approaches full utilization, increases in prices and wages become more serious, but he did not definitely take a position against the increases sought by respondents."

The Price Administrator offered no proof in the *North Carolina case* (Docket 29036) of inflation flowing, or likely to flow, from the increase in coach fares for civilian passengers traveling within the State of North Carolina on the lines of the railroads, appellees here. He was driven to the charge that these railroads already enjoyed adequate earnings. In taking that position, he must have recognized that the question of the carriers' revenue needs in the public service is for the I. C. C.'s determination, Section 15a (2), to say nothing of the transportation policy announced by the Congress. Therefore, to avoid the appearance of putting his view ahead of the conclusion of the I. C. C. on that question of fact, he seeks to state his position as one of law. But, when his assignment of error is examined, it will be found to state a conflict over this question of fact. The assignment concludes with reference to fares "productive of net revenues in excess of those required to meet maintenance and operating costs and to yield a fair return" (R. 587).

So understood, it is not surprising to find the Price Administrator introducing statistical data respecting the revenues of these North Carolina lines (Witness Whitnack, R. 279; Exhibit 20, R. 402). To strengthen his hand (which more clearly shows his real position), he determines an average "rate of return," as he calls it (R. 408-A), of 18.3 per cent for the seven major railroads in North Carolina for

twelve months ending October 31, 1943. He will argue in the face of such a "return" that no question of revenue inadequacy could arise. But we now examine his results:

The "return" he figured varies widely between the seven roads. The Clinchfield Railroad produced the high and the Norfolk Southern Railway produced the low. Yet, the North Carolina Commission, in denying the increase from 1.65 cents to 2.2 cents, said:

> "The evidence which brings the operating results of the seven Class I railroads up through December 31, 1942, indicates a very probable need for additional revenue from coach fares by two of the carriers, viz., Carolina Clinchfield and Ohio Railway and Norfolk Southern Railway Company." (R. 134.)

And, in the supplemental order of May 16, 1944, the North Carolina Commission said:

> "*Ordered*, That the Norfolk Southern Railway Company and the Carolina Clinchfield and Ohio Railway be and the same are hereby authorized to increase their one-way fares for intrastate transportation of civilian passengers traveling in coaches to 2.2 cents per mile, and to increase their round-trip fares for civilian passengers traveling in coaches to the basis of 180 per cent of the one-way coach fares of 2.2 cents per mile or 1.98 cents per mile traveled. Said round trip fares to be subject to a limitation of three months." (R. 27.)

In this connection, we point out that of the Clinchfield's total mileage of 308 miles 117 are in North Carolina; Norfolk Southern has 734 miles with 634 miles in North Carolina. Judging by those figures, North Carolina intrastate traffic is already a drag on the Norfolk Southern Railway (R. 321).

Again the frailty of figures such as the Price Administrator has furnished is shown by the fact that he has lumped into his conclusions the results of operations of large lines, such as the L. & N. of 4,745 miles with but thirteen miles in North Carolina (R. 321).

The Price Administrator reaches those "returns" by arriving at "net railway operating income" before deducting Federal income taxes, and also excluding expenditures for rents for leased roads and equipment (R. 408-A).

Taking the latter first: If a railroad does not pay for rent of roads it holds and operates under lease, the lessors will not sit idly by. To take away such a road would, in the majority of cases, disrupt the railway system of the lessee, hardly to the public good.

Again, railroad cars, under modern needs of the commerce of our country, can not be confined to the lines of their owners. They are, and must be, interchanged under load in order to reach ultimate destinations. The road using on its line such a car of foreign-line ownership must pay for such use.

Finally, the calculation of a rate of return without considering Federal taxes distorts the picture even further. There are some things, like omitting a dividend, a railroad company may do and still survive, but failure to pay its taxes is not one of them. In this respect, it is no different from any other industry or individual citizen. Taxes come first, and, may we say, particularly "Federal taxes." Yet, these are the ones the Price Administrator would ignore in figuring a fair rate of return for these railroads.

In comparison with this forced result to support the Price Administrator's position, we submit the "returns" of record as we have shown them (R. 315, 318, 319, 320):

For many years past passenger operations of these railroads have been in the red. For Atlantic Coast Line, Clinchfield, L&N, Norfolk Southern, Seaboard, and Southern, the six principal railroads here involved, from 1936 to 1940, both inclusive, in a range from 16 to 19 millions of dollars, the average deficit has been 18 millions. In 1941 there was a drop to 8 millions. In 1942 there was an income of 27 millions. The average deficit for the seven-year period (1936-42) was 10 millions. The six-year cumulative

deficit, 1936 to 1941, both inclusive, was 99 millions, in order to offset which at least four years as good as 1942 must be anticipated. (R. 318.)

Railroads of the Southern Region, in common with railroads of the country in general, are chronically in need of additional revenue. For example, for the average of ten years (1921-30) Class I railroads of Southern Region earned only 4.20 per cent on their investment in railway property used in transportation service. (R. 319.)

For the succeeding twelve years (1931-42) the yield was but 2.48 per cent, while for the 22-year period (1921-42) it was but 3.23 per cent (R. 319).

Specifically, for the 22-year period (1921-42), petitioners herein earned only 3.41 per cent on their investment (R. 320).

The Interstate Commerce Commission found in this case:

> "Protestants point out that these seven respondents in the last 2 years have been able to take care of their increases in operating expenses and railway tax accruals, and still show consistent and substantial increases in their net railway operating income. The relation of net railway operating income to investment in railway property including cash, materials, and supplies, for these respondents reflects average rate of return, after Federal income taxes, as follows: 1938, 2.98 per cent; 1939, 3.76 per cent; 1940, 3.95 per cent; 1941, 5.41 per cent; and 1942, 5.78 per cent." (258 I. C. C., 149; R. 89.)

In this connection, we quote further from the same report:

> "Economic conditions since then have greatly changed, and the railroads today, instead of trying to attract passenger traffic, are endeavoring to discourage unnecessary travel, and are cooperating with the Office of Defense Transportation in its effort to avoid the rationing of passenger travel." (258 I. C. C., 137; R. 75.)

"• • • The evidence (fol. 112) here before us does not indicate that the passenger traffic of these respondents as a group is producing more than a fair return." (258 I. C. C., 149, 150; R. 89.)

"The transportation conditions bearing upon the reasonableness of the interstate fares have not changed materially since the adoption on April 6, 1943, of our report on further hearing in Ex Parte No. 148, wherein we declined to disturb our prior finding that the increased interstate fares then and now in effect were just and reasonable. Upon the records in the instant proceedings, we can find no warrant for changing our views that a basic coach fare of 2 cents per mile, plus an additional 10 per cent for the duration of the war, is reasonable for general application. Such a fare is now in effect for one-way application generally throughout the country, except intrastate in the four States the fares in which are here before us. Also, the respective round-trip fares for application in coaches and in sleeping and parlor cars are uniform generally throughout southern territory, except intrastate in these four States on traffic in coaches and intrastate in Alabama and Tennessee on traffic in sleeping and parlor cars." (258 I. C. C., 153; R. 94.)

Nothing in this record shows inflation or any tendency toward inflation. The average coach traveler in North Carolina journeys thirty miles (R. 170). One-half cent (1.65 to 2.2) per mile means only 15 cents per trip. Whether the trip is for business or pleasure, 15 cents could hardly produce inflation.

But the total of these small items may be stressed. The total is large and thereby important to these railroads. However, reverting to the Price Administrator's own idea about Federal taxes, excess profits, surcharges, etc., it quite obviously appears that the very excess earnings, as he sees it, go right into the Federal treasury. There could be no inflation from such payment; just the contrary. We marvel that the Price Administrator and the Secretary of the Treasury are not here supporting us.

If the Price Administrator is sound, his position comes to this: The I. C. C. should regulate railroad rates to wipe out the excess profits tax and surcharges. If so, we ask, why not wipe out all taxes, State as well as Federal? We submit that should that be done, it would not help defeat inflation, except by the strangulation and suspension of business which obviously would not be in the public interest. But, aside from that, such a regulation of railroad rates can not be accomplished. These railroads must make their income tax returns and pay their income taxes as accrued on each year's operations. These payments are usually in quarterly installments. Subsequently, whenever events justify it overpayments are claimed such, for instance, as arise from such items as the two-year carry back of net losses and unused excess profits credits. When recognized, such overpayments are included as credits in the accounts of the road for the year in which they are actually received. The reverse of this is also true, that is, the road must make appropriate accruals and payments in the year the tax liability is determined for deficiency assessments of income and excess profits taxes applicable to income of prior years. Hence, while the roads pay year by year, several years elapse before these roads know what their final tax bill really was in a given year.

Moreover, should a given road figure out its rate levels (assuming it could be done) in order to obviate some one or more of these taxes, we submit such rate level applicable to it would bankrupt another road. These roads are pretty much competitors. If they are not kept on an even rate keel, one gets all the traffic. Hence, the futility of putting the Price Administrator's idea into actual practice.

The I. C. C. has considered the practical results which grow out of the complicated processes necessary in order to determine the Federal taxes. It did so after having heard the Price Administrator in *Ex Parte 148*. In its last report in that proceeding, 259 I. C. C., 181-182, the I. C. C. said:

"Calculation of income and excess-profits taxes for the railroads is affected by a variety of conditions peculiar to individual companies in the particular year. Many railroad companies have large holdings of government obligations, which for tax purposes are either wholly or partially exempt. For excess-profits tax purposes, 100 per cent of all dividends received are excluded from the tax computation, and 85 per cent of such dividends are excluded for normal and surtax purposes. One year's proportion of any discount on old debt is deductible in computing taxable net income, and where new bonds are floated at a discount, all of the discount can be charged off at once in computing taxes or, if the company so elects, the benefit of the proportionate part of it may be claimed in any taxable year. Similarly, premiums paid in connection with the retirement of debt would be deducted in the computation of taxable income as well as losses on equipment or other depreciable property destroyed by casualties where such losses are not compensated by insurance or otherwise. Owing to the averaging provisions in the computation of excess-profits taxes, the true situation with regard to the amount of taxes ultimately to be paid by any road or all the roads for any year or years will probably not be finally determined until such time as all the adjustments thereunder have been finally made. Under such conditions, the attempt to estimate the amount of future excess-profits taxes is hazardous, if not altogether impracticable."

In *Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, Mr. Justice Brandeis, at page 399, said:

"* * * In calculating whether the five-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others."

A year later, Mr. Justice Brandeis, again speaking for the Court, in *Georgia Ry.* v. *R. R. Comm.*, 262 U. S. 625, at pages 632-633, said:

"The companies contend that there was error, also, in estimating the amount of the probable net income. One objection relates to the federal corporate income tax (10 per cent.) assumed to be $45,364. The Commission treated the tax as a proper operating charge. The court disallowed it; and thus increased its estimate of probable net income. In this the court erred. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388."

However, in *Galveston Elec. Co.* v. *Galveston*, immediately after the quotation above set out, Mr. Justice Brandeis went on to say:

"* * * But the fact that it is the federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair. For under §216 the stockholder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment."

We think this last observation of the Court has given rise to misunderstanding in respect of Federal taxes. However, as the credit allowed in Section 216 of the Revenue Act of 1918 (40 Stat. 1069) is no longer applicable, we think it is unnecessary to pursue the matter further. For with the credit no longer allowed it would seem that the first quotation from the *Galveston case*, affirmed in the *Georgia Ry. case*, clearly states the view of the Court beyond any question.

The I. C. C., in its last report in *Ex Parte 148*, 259 I. C. C., 189, said:

"Nothing in the record shows that the 10-percent increase in passenger fares has had any inflationary effect."

We submit that it is clear beyond any question that as the Price Administrator recognized he could not make proof of inflation or the likelihood of inflation in respect

of passenger-fare increases here dealt with that he was forced to a position in respect of railroad earnings and revenue needs which is inherently unsound.

The I. C. C.'s Finding of Preference or Prejudice as Between Persons Traveling in Intrastate and Interstate Commerce, in Which the Price Administrator Has No Interest, Amply Supports the I. C. C.'s Order.

The report (R. 69-96, 258 I. C. C. 133) of the I. C. C., upon which the order (R. 507-508) here assailed was entered, makes adequate findings supported by evidence of two separate and distinct factual situations; that is, it found the lower state fares caused:

(1) Preference or prejudice as between persons traveling in intrastate commerce, on the one hand, and interstate commerce, on the other hand; and

(2) Discrimination against interstate commerce.

Section 13 (4) of the Act declares both of the foregoing to be unlawful. Here the finding is as to both. A finding in respect of either the one or the other would suffice to support the order. Hence, we at once point out that, for the moment laying aside the finding of discrimination against interestate commerce, the record stands with a finding of preference or prejudice as between persons traveling in the two classes of commerce. It follows that no matter what the views of the Price Administrator may be with respect to the revenue needs of the rail carriers (upon which he challenges the finding of discrimination against interstate commerce) his views are irrelevant and immaterial as to the duty of the I. C. C. to remove the preference or prejudice as between persons, which the Act condemns. In the case of two passengers accorded identically the same service no valid reason could possibly exist for charging the intrastate passenger only 1.65 cents per mile while charging the interstate passenger 2.2. cents per mile.

The I. C. C.'s finding of preference or prejudice as between such travelers was clearly made, and is amply supported of record. We have stated the findings and the supporting evidence at pages 34-42 of our brief in the North Carolina case, No. 560, and in Appendix D thereto. One of the Commissioners of the North Carolina Utilities Commission, testifying before the I. C. C., made it clear that it is generally true that these interstate and intrastate passengers are handled under the same conditions and on the same trains (R. 254). Indeed, the order of the North Carolina Commission refusing to sanction the increase which gave rise to these proceedings found that, in the very nature of things, the fares for and the transportation of interstate and intrastate persons is generally inextricably bound together (R. 140).

There can be no doubt of the correctness of the I. C. C.'s finding in respect of this phase of the case. Standing alone, it supports the order here assailed. The Price Administrator's views with respect to revenue needs are entirely outside the issues in this phase of the case. We thus find a complete answer to the Price Administrator's appeal. The order stands squarely on this one phase as to which the Price Administrator may not be heard and in which he is not interested. It is really unnecessary to consider the views he puts forth in respect of the other phase.

The Price Administrator Was Not Entitled to a Trial De Novo in the District Court.

The effort of the Price Administrator to proceed in the District Court as if a trial *de novo* and thereby justify the introduction of evidence outside and beyond the record made before the I. C. C. failed. Judge Parker, speaking for the Court, said:

> "We have heard the case on the record as made before the Commission. Other evidence has been offered and has been received subject to ruling as to its compe-

tency. We regard the rule as well settled that the case must be heard on the record made before the Commission and accordingly exclude the evidence not embraced in that record. For the reasons above stated, however, our decision would not be different if this evidence were admitted and considered." (56 F. Supp., 621; R. 571-572.)

The Price Administrator in his appeal at bar has taken no assignment of error to that ruling and decision of the District Court.

Decisions of this Court Are Controlling of the Price Administrator's Appeal.

The contentions that the Price Administrator makes here have been answered in three decisions of this Court. Each one of these decisions affords ample authority for affirming the lower court's decree on the Price Administrator's appeal.

Davies Warehouse Co. v. *Bowles (Price Administrator)*, 321 U. S. 144, involved charges of a public warehouse. Mr. Justice Jackson, speaking for the Court, referred to the provision of the Emergency Price Control Act that "nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility, * * * " (p. 146). It was held Davies' business was that of a public utility within the exemption of the Act, pointing out that the warehouse company was subject to the State's Railroad Commission under its Utilities Act (p. 156).

Vinson, Director v. *Washington Gas Light Co.*, 321 U. S. 489. Here gas rates were involved which had been considered by the Public Utilities Commission of the District of Columbia. Mr. Justice Roberts, speaking for the Court, again stressed the exemption found in Section 302 (c) (2) of the Emergency Price Control Act (p. 494), and at pages 497-498 said:

"The Emergency Price Control Act of 1942, while it gives the Administrator power over prices of 'commodities,' which are not generally regulated by public authority, specifically and expressly withholds from the Administrator jurisdiction over public utility rates. And, as we have noted, the Stabilization Act of October 2, 1942, did not alter this prohibition but required merely that no utility should generally increase rates in effect September 15, 1942, unless it first gave thirty days' notice to the President or his representative and consented to the timely intervention of that representative before the federal, state, or municipal authority having jurisdiction to consider the increase.

"It is not clear that this language confers a right of intervention. The bill as passed by the Senate contained a provision that there should be no increase in utility rates unless they were approved by the President. The House refused to concur, with the result that only the language now contained in the proviso appeared in the bill. The assertion that, while the Price Administrator or the Director may present his views to the regulatory body 'he had nothing to say about its decision,' was made and not contradicted on the Senate floor in discussion of the conference report. Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation, but in both the original Act and the amendment, as this court has recently said in *Davies Warehouse Co.* v. *Bowles*, (321 U. S. 144, 64 S. Ct. 474, 480) was careful 'to avoid paralyzing or extinguishing local institutions.' Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises."

I. C. C. v. *Jersey City*, 322 U. S. 503, involved passenger fares on the line of the Hudson & Manhattan Railroad. Mr. Justice Jackson, speaking for the Court, considered the reasons given by the lower court for setting aside the orders

of the I. C. C.; one was that it "lightly brushed aside" the economic-stabilization phase of the case and gave too little weight to the Price Administrator's contentions (p. 519). Of that he said:

> "• • • Congress was free to apportion their functions as it saw fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies. Commerce Commission authorization of rate increases could have been subjected to review or veto so far as any objection of the Commission is concerned.
>
> "But Congress did no such thing. The legislative history of relevant provisions of the Act was reviewed in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 It was there pointed out that Congress rejected a proposal that such rates should not be increased without consent of the President. On the other hand it was assured by executive representatives that rate advances already subject to scrutiny on behalf of the public and to proof of reasonableness were not the source of the more substantial inflationary threats. Congress then adopted the provision we earlier quoted.
>
> "• • • Under this statutory plan, as we have said in the language of Mr. Justice Douglas, 'The Administrator does not carry the sole burden of the war against inflation.' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 325, 331.
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> • • • • • • • • •
>
> "• • • The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitation on judicial review is to be thrown overboard. The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded to some factors in relation to others.
>
> "The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transportation. • • • The need for informed, expert

and unbiased judgment is apparent. The problem is intricate, the carrier is one of peculiar characteristics, its wartime traffic is of varying density, with peaks and rush hours, the rates and carrying capacities of competitors by bus and ferry are involved in any estimate of traffic diversions or probable effects of rates. What rates are required to meet actual and proper operating expenses, what revenue must be available to avoid defaults and sustain credit, what divisions should be made on interchanged traffic are as complex problems in rate-making as can readily be imagined. The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. We think the weight to be given to the Price Administrator's contentions was for the Commission, not the Court, to determine." (pp. 519-523.)

We submit the above authorities are controlling here.

CONCLUSION.

In conclusion, we submit that the I. C. C. has made appropriate findings on substantial evidence and has given full consideration to the representations of the Price Administrator; that the Price Administrator, being unable to offer proof of possible inflation, was forced to take an unsound position in respect of railroad earnings in an effort to support his opposition to the increase in passenger fares here involved. We further submit that the I. C. C.'s finding of preference or prejudice as between persons traveling in intrastate and interstate commerce, with which the Price Administrator has no concern, amply supports the order so that whether the position of the Price Administrator is upon sound or unsound grounds the order of the I. C. C. was appropriately sustained in the lower court. Further we submit the Price Administrator was not entitled to a trial *de novo* in the District Court. Finally, we confidently submit that the recent decisions of this Court rule the questions raised by the Price Administrator

in his appeal at bar, and that the decree of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX.

Extract from Interstate Commerce Act, Part I, 49 U. S. C., Section 13(4):

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice, causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Extract from Emergency Price Control Act of 1942, 50 U. S. C., Sec. 942(c), 56 Stat. 23, 36:

"* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) *rates charged by any common carrier or other public utility*, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services." (Emphasis supplied.)

Extract from Stabilization Act of 1942, 50 U. S. C., Sec. 961, 56 Stat. 765:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Emphasis supplied.)

SUPREME COURT OF THE UNITED STATES.

Nos. 560, 561.—October Term, 1944.

State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., et al., Appellants,
560 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

William H. Davis, Economic Stabilization Director, by Chester Bowles, Price Administrator, Appellants,
561 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

On Appeals from the District Court of the United States for the Eastern District of North Carolina.

[June 11, 1945.]

Mr. Justice Black delivered the opinion of the Court.

The North Carolina State Utilities Commission brought suit to enjoin enforcement of an order of the Interstate Commerce Commission. 258 I. C. C. 133. The Federal Economic Stabilization Director acting through the Price Administrator sought and was granted the right to intervene as a party plaintiff. A federal district court of three judges denied the injunction, 56 F. Supp. 606, and the case is here on direct appeal under § 210 of the Judicial Code.

This clash between state and federal agencies came about because the State Commission and the Interstate Commerce Commission each claimed the paramount power to fix railroad rates in North Carolina. The North Carolina Commission ordered railroads doing business in the state to charge no more than 1.65 cents per mile for carrying intra-state coach passengers from one point in the state to another. Despite this State Commission order, the Interstate Commerce Commission authorized the same

railroads to charge 2.2 cents per mile for the same type of carriage.[1]

The Interstate Commerce Commission asserted its power to prescribe these purely intra-state rates under § 13(4) of the Interstate Commerce Act. 49 U. S. C. § 13(4). That section, which is set forth below,[2] empowers the Interstate Commerce Commission to prescribe intra-state railroad rates under certain conditions, despite conflicting state orders as to the same rates. The conditions that Congress imposed as a prerequisite to Commission action are that the Commission shall hold a "full hearing" and find that the state-prescribed rates either caused (1) undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intra-state commerce on the one hand, and interstate commerce on the other hand, or (2) undue, unreasonable, or unjust discrimination against interstate commerce. The Commission held hearings which are challenged on various grounds as falling short of "full" hearings. It made findings and concluded that the 1.65 state rate was unduly prejudicial to interstate passengers, and that the state rate constituted an undue and unjust discrimination against interstate commerce. These conclusions are attacked on the ground that they are supported neither by findings nor evidence. The crucial question involved in all these contentions is whether the indispensable prerequisites to the exercise of the Federal Commission's power over intra-state rates have been shown to exist with sufficient certainty. Before making any detailed reference to the hearings, findings or

[1] There is a corresponding conflict which involves round trip coach rates. The questions presented are the same with regard to one way and round trip rates, and we shall therefore consider both of them by reference to the one way rate.

[2] "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." 49 U. S. C. § 13(4).

evidence, it would be helpful to set out certain guiding principles which lead us to a resolution of the crucial question.

Section 13(4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. See *United States et al.* v. *Penn. R. R. Co., et al.*, Nos. 47-48, decided January 29, 1945. No such breadth of authority is granted to the Commission over purely intra-state rates. Neither § 13(4), nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intra-state rates. Since the enactment of § 13(4), as before its enactment, a state's power over intra-state rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.

Intra-state transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Express Co.* v. *South Dakota*, 244 U. S. 617, 625. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty." *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510. Before the Commission can nullify a state rate, justification for the "exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211-212. See also *City of Yonkers* v. *United States*, 320 U. S. 685. And the intention to interfere with the state's rate-making function is not to be presumed. *Arkansas Commission* v. *Chicago, etc., R. R.*, 274 U. S. 597, 603; nor must its intention in this respect be left in serious doubt. *Illinois Commission* v. *Thompson*, 318 U. S. 675, 684-685. The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. We shall now take up the two grounds upon which the Commission set aside the state order.

Prejudice Against Interstate Passengers. On this aspect of the case the Commission's findings were that the interstate 2.2 cents rate was just and reasonable; that the accommodations afforded interstate and intra-state passengers in North Crolina were "substantially similar"; that in general these passengers traveled in the same trains and in the same cars; and from these, it concluded that since interstate passengers were forced to pay higher fares than intra-state passengers, there was an undue and unreasonable disadvantage and prejudice of interstate passengers. On these findings it issued the statewide order requiring all intra-state passengers to pay 2.2 cents per mile. We think these findings failed to give adequate support to the order.

In effect, the Commission's holding was, and its argument is here, that § 13(4) automatically requires complete uniformity in intra-state and interstate rates. That argument is in short that under our national transportation system interstate travelers and intra-state travelers use the same trains; for a state to fix a lower intra-state rate than the interstate rate is therefore an undue advantage to the intra-state passengers and an unfair discrimination against the interstate passengers. If Congress intended to permit such an oversimplified form of proof to establish "unjust discrimination", then its requirement of a "full hearing" was mere surplusage. In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intra-state rates shall never be lower than interstate rates. The argument of the Commission in this regard runs counter to the language of § 13(4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation. The clause about "persons" and "localities" is as the legislative history shows, a practical enactment into law of a decision of this Court in the "*Shreveport*" case.[3] *Houston and Texas Ry. Co.* v. *United States*, 234 U. S.

[3] The House Committee reporting this bill said with reference to the provisions of Sec. 13(4): "After such hearing the Commission shall make such findings and orders as may in its judgment tend to remove any undue advantage, preference, or prejudice as between persons or localities in state and interstate or foreign commerce. The provision practically enacts into law the decision of the Supreme Court in the so-called 'Shreveport' case. Any undue burden upon interstate or foreign commerce is forbidden and declared to be unlawful. It is believed that the provisions of this section will have a beneficial and harmonizing effect, and will tend to reduce the number of so-called 'Shreveport' cases, while at the same time recognizing the regulatory bodies of the several states." Report No. 456, 66th Cong., 1st Sess., p. 20.

342. In the "*Shreveport*" case the Commission found from evidence that certain Texas intra-state rates to Texas points were far below the interstate rates charged to carry the same types of freight from Shreveport, Louisiana. The distances and conditions of both transportations were found to be substantially the same. The Court sustained the Commission's conclusion that the Texas intra-state rates constituted an unfair discrimination against Shreveport and persons doing business there. The Commission's order was not statewide, but only required removal of the discrimination against the particular localities and business groups affected by the discrimination.

In *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 579, 580, this Court refused to sustain a Commission order nullifying all state passenger rates because of a discrimination against interstate travelers and against localities. The Commission had found there as here that state and interstate passengers rode on the same trains in the same car and perhaps in the same seats. It had found there, as it did here, that this constituted an undue discrimination against interstate passengers, and it issued a general sweeping order against all intra-state passenger rates. This Court pointed out that the order went far beyond the principles announced in the *Shreveport* case, and declined to sustain the statewide order on this phase of the case. See also *Florida* v. *United States*, 282 U. S. 194, 208. So here, the finding that interstate passengers paid higher fares than intra-state passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust discrimination against interstate passengers.

Discrimination Against Interstate Commerce. One ground of the Commission's order was that the intra-state rates discriminated against interstate commerce as such. The findings of the Commission on which this conclusion rested were that the 2.2 cents interstate rate was just and reasonable; the same trains in general carried both interstate and intra-state passengers; the North Carolina railroads to which the intra-state rates were applied, would have received $525,000 more annual income from the passengers they carried had the 2.2 cents interstate rate been applied; from this the conclusion was reached that intra-state traffic was "not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation service."

This conclusion of the Commission, if based on findings supported by evidence, would justify its order. For in *Florida* v. *United States*, 292 U. S. 1, 5, we said that § 13(4) authorized the Commission "to raise intra-state rates so that intra-state traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intra-state." We sustained the Commission's order there because it was based on findings supported by evidence that the intra-state rate "was abnormally low and less than reasonably compensatory . . . insufficient under all the circumstances and conditions to cover the full cost of the service." Neither in its formal findings, nor in its discussion of the facts did the Commission indicate that the North Carolina railroad rates here involved were less than compensatory or insufficient to cover the full cost of service. Nor did they find that maintenance of these rates was necessary to the operation of a nationally efficient and adequate railway system.[4]

[4] In Railroad Commission v. Chicago B. & I. R. Co., 257 U. S. 563, this Court sustained a statewide Commission order raising intrastate rates. Section 13(4) in the context of the 1920 Transportation Act, 41 Stat. 456, as it then existed, was construed as requiring the Commission to prescribe rates sufficient "to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." 584-585. The 1920 Act, however, treated the national railway system as a unit. The net returns for any particular railroad were limited by the Act. . . . All above this limitation went into a common pool to be distributed for the use of weak railroads. In this way, all railway income inured to the benefit of all the railroads individually and collectively to aid in "maintaining an adequate railway system." This Court has said that Congress adopted the pooling provisions because "it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties." New England Divisions case, 261 U. S. 184, 191. But Congress in 1933, 48 Stat. 211, repealed this part of the 1920 Act; the income pooling system was abandoned; the rule of rate making was re-written, and while the Commission was to give consideration to the need of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenue sufficient to enable the carriers under honest, economical and efficient management to provide such service, the rates were no longer to be treated on a national basis as though all railroads constituted one system. House Report No. 193, 73rd Cong., 1st Sess., pp. 30-31. Railroads were to be treated on an individual basis. Abandonment of the profit pooling system made this necessary to carry out the continuing Congressional purpose to prevent "an unreasonably large return upon the value of their properties." The Commission recognized this legislative change in rate making policies by its reference to "revenues required to enable *respondents* to render adequate and efficient transportation service." The "respondents" referred to were the individual railroads to which North Carolina's order applied.

But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intra-state passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intra-state traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina. It thought this action was justified by this Court's opinion in *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485.[5] Aside from the fact that "The mere existence of a disparity between particular rates on intra-state and inter-state traffic does not warrant the Commission in prescribing intra-state rates", *Florida* v. *United States*, 282 U. S. 194, 211-212; *Utah Edible Livestock Rates and Charges*, 206 I. C. C. 309, there is reasonable doubt as to whether the Commission had ever fixed 2.2 cents as the only reasonable interstate rate.

The whole argument that it had done so rests primarily on an order made in 1936. At that time, the Commission made a comprehensive investigation of rates throughout the nation, and after elaborate discussion made findings of fact. It concluded that any rate over 2 cents per passenger mile would be unreasonable and unlawful. But it also declared that a rate of 1.5 cents then commonly charged throughout the Southern states, would not be "unreasonable or otherwise unlawful." 214 I. C. C. 174, 257. Railroads in the South continued to charge 1.5 cents most of the time from then until 1942. March 2, 1942, upon an application of the American railroads, the Commission in *Ex parte 148*, granted a general 10% increase on all rates then in existence. This increase it found was necessary to enable the railroads "to continue to render adequate and efficient railway transportation service during the present emergency." 248 I. C. C. 545, 565. The Commission specifically stated, p. 606, that its conclusion

[5] This case did not involve a sweeping statewide order based on general railroad revenue needs. It related to a problem like that considered in the *Shreveport* case. The rates involved applied to switching movements in a single "Switching District", "essentially a unit, so far as switching movements are concerned." This Court's holding in that case does not support the statewide order here.

was not based on "individual, sectional, or particular industrial desires or needs." Four months later, on July 14, 1942, certain railroads operating in the South including the railroads involved in the *North Carolina* case, filed a petition with the Commission asking that it modify its 1936 order, so as to permit them to charge 2.2 cents per mile. Two weeks later, without a hearing, without evidence, and without discussion, the Commission entered an order declining to amend its 1936 order, but modifying its 10% rate increase order, "so as to *authorize*" the petitioning railroads to charge 2.2 cents per mile. It made no finding that the railroads needed this increase in order to maintain adequate railroad systems and of course could not have done so unless it relied upon the old 1936 evidence. There was no issue of this nature raised by any of the parties in the 10% rate increase proceedings. Neither before nor since these Southern railroads were authorized by the Commission to increase their interstate rate to 2.2 cents has any hearing been held on the subject. Petition of North Carolina for a hearing was denied. Nor has there been any finding based on evidence that the 1.65 cents rate which the Commission found adequate, and neither "unreasonable nor unlawful" has ceased to be such. We are unable to find from any of the various orders that the Commission has ever yet made findings supported by evidence and upon them set aside its 1936 conclusions that a 1.5 cents rate for Southern territory was reasonable and lawful, except to the extent that it held that a 10% increase was justifiable.

Furthermore, even assuming that the Commission had previously made a valid 2.2 cents per mile general order broadly applicable to all railroads in the Southern territory or throughout the nation, it does not follow that such a general order must permanently stand as to each and every separate railroad or railroad system. The very nature of such a broad general order requires that it contain a saving clause for future modification and adjustment of particular rates. This Court declared that such a saving clause was essential even at the time that all surplus railroad profits were pooled for the common good of the national system. *Railroad Commission* v. *Chicago B. & I. R. Co.*, 257 U. S. 563, 579; *Georgia Commission* v. *United States*, 283 U. S. 765, 772; *United States* v. *Louisiana*, 290 U. S. 70, 76, 77, 79.

Such a saving clause left to the state its power to bring about particular changes in the internal intra-state rate structure neces-

sary to keep intra-state revenues as a class in harmony with interstate needs. *Railroad Commission* v. *Chicago B. & I. R. Co.*, 257 U. S. 563, 580. For the Interstate Commerce Commission was "without jurisdiction over intra-state rates except to protect and make effective some regulation of interstate commerce." *Illinois Comm'n* v. *Thomson*, 318 U. S. 675, 684. Consequently, no one but the state had power to readjust its internal intra-state rate structure. This it undertook to do by a hearing focussed upon the state railroads individually and collectively. Four railroads were denied the increase, and they are the only ones now affected by the Interstate Commerce Commission order. Other roads were granted the increase. Its order to this effect rested on evidence as to the differing qualities of intra-state and interstate accommodations afforded as well as the net revenues of different roads. The State Commission found as to the four roads which it denied an increase that their profits from passenger revenues even on a 1.65 cents rate were so great that continuance of that rate would be reasonable and just to them.

In the proceedings before the Interstate Commerce Commission, the state and the Price Administrator presented these issues which the State Commission had considered. Both the railroads and their adversaries offered evidence on the points. There was evidence that the four railroads were carrying more passengers and more freight, and were more prosperous than they had ever been in their history. This evidence showed that they were in the highest excess profit tax brackets, and that somewhere between 80 and 90% of all their profits were subject to be paid for federal taxes.

There was evidence offered by the railroads, which indicated that their 1942 per mile net cost of carrying coach passengers was under or about 1 cent. The Commission had found facts in the 1936 report, 214 I. C. C. at pp. 216, 266, which indicated a mileage coach passenger cost of 3.25 cents. Evidence of the four railroads also showed their average revenue increase since 1936 had been approximately 250%. This great revenue increase transformed a 1936 $16,426.00 deficit of six North Carolina roads, including the four here involved, into a 1942 $26,699,988.00 profit. Most of this increased profit was shown to have been derived from passenger revenues.

All of this evidence and much more to which we might advert was sufficient to show that the Commission might have found, had it made any findings on the subject at all, that a 1.65 cents rate for these four North Carolina railroads would have been a fair coach passenger contribution to revenues required to enable them to operate profitably and efficiently. But it made no findings on this subject at all. The purpose of the National Transportation Law is to assure railroads a fair net operating income and no more. *Dayton-Goose Creek Railway* v. *United States*, 363 U. S. 456. The power of the Commission to require states to raise their intra-state rates depends upon whether intra-state traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to *yield a fair return on the value of property directed to the transportation service* both interstate and intra-state. *United States* v. *Florida*, 290 U. S. 70, 75. But the Commission cannot "require intra-state rates to be raised above a reasonable level." *United States* v. *Florida*, *supra*, 78. And where there is evidence as here from which the Commission could have found that a rate of 2.2 cents was far above a reasonable rate level for the intra-state coach traffic of these four railroads, the Commission must make findings on that issue, which findings are supported by evidence, before entering an order supplanting the state authority. Without such findings supported by evidence, the Commission was not authorized to find that the intra-state rates discriminated against interstate commerce.

Because the order of the Commission was not based on adequate findings, supported by evidence, the District Court should have declined to enforce its order. The judgment of the District Court is

Reversed.

SUPREME COURT OF THE UNITED STATES.

Nos. 560-61.—October Term, 1944.

State of North Carolina, North Carolina Utilities Commission, Charlotte Shippers and Manufacturers Association, Inc., et al., Appellants,
560 *vs.*
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561 *vs.*
The United States of America, Interstate Commerce Commission, Aberdeen and Rockfish Railroad Co., et al.

Appeals from the District Court of the United States for the Eastern District of North Carolina.

[June 11, 1945.]

Mr. Justice Reed, dissenting.

The Court has set aside an order of the Interstate Commerce Commission which was entered May 8, 1944, on a Commission report of the preceding March 25th. 258 I. C. C. 133. The order covered investigations instituted upon separate petitions of carriers in North Carolina, Kentucky, Alabama and Tennessee to determine whether the maintenance of intrastate fares in these states at levels below fares and charges established for application to interstate traffic in respective states on October 1, 1942, caused undue or unreasonable advantage, prejudice or preference between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other, or any such discrimination against interstate commerce. 49 U. S. C. § 13(4). The petitions sought, too, prescription of fares and charges by the Commission to remove any preference, advantage, prejudice or discrimination found to exist. See also *Alabama et al.* v. *United States et al.* and *Davis* v. *United States et al.*, Nos. 574 and 592,

decided today. This dissent is applicable both to this and that opinion.

Without summarizing the entire report we call attention to a finding which it contains that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable appellees (the interstate carriers) to render adequate and efficient transportation service and that this "unlawfulness should be removed by increasing" the intrastate fares to the level of the interstate fares. 258 I. C. C. 154, 155, Findings 5 and 6. This finding, if supported by evidence, is in our opinion sufficient to justify the applicable order of May 8th which is under review in this appeal. That order required the carriers to maintain and apply intrastate fares on bases no lower than those applied by the carriers in interstate transportation to, from and through the four states.

The Interstate Commerce Commission has the power to make this order on a valid finding of such discrimination against interstate commerce. 49 U. S. C. § 13(4). It has long been established that this section delegates a valid power of regulation of intrastate rates to the Commission. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563. Cf. *Minnesota Rate Cases*, 230 U. S. 352, 432, and *Houston & Texas Ry.* v. *United States* (the *Shreveport* case), 234 U. S. 342, 351. It gives authority to the Commission to raise intrastate rates so that that traffic may produce its fair share of the required earnings. *United States* v. *Louisiana*, 290 U. S. 70, 75. And that authority does not depend upon the recapture, in whole or in part, of excess earning of individual railroads under the requirements of the Transportation Act of 1920, 41 Stat. 488, Sec. 15a, now repealed. Emergency Railroad Transportation Act, 1933, 48 Stat. 220, Sec. 205, for creation of a general railroad contingent fund for financing the national transportation system of railways. Section 13(4) was not changed by the Act of 1933. This section in conjunction with the revised and reenacted Section 15a of the Interstate Commerce Act now empowers the Commission, in accordance with the statutory provisions, to remove the discrimination against interstate commerce by prescribing intrastate fares.[1] *Florida* v. *United States*, 292

[1] The present Section 15a, 49 U. S. C., reads as follows:

"(1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the

U. S. 1, 4. First. Cf. *Illinois Comm'n* v. *Thompson*, 318 U. S. 675, 682. This Court today recognizes this rule. The four states attack the finding of discrimination against interstate commerce which finding is essential to the validity of the present order to maintain intrastate fares at the level of interstate fares, on the ground that there is neither finding nor evidence that the intrastate rates are not producing a proper proportion of the carriers' needed revenue. This Court sustains the attack as sufficient to invalidate the Commission order. We think the argument, which the Court has sustained, has its source in a misconception of the purpose of this present proceeding.

The petitions were filed by the carriers, the investigation was made and the order under dispute here was entered to coordinate the intrastate passenger fares in these four states with the passenger fare structure of the entire country. 258 I. C. C. 133. There had been a number of recent proceedings involving the national structure. The evidence, which will be referred to later, presented in those proceedings is, we think, properly to be considered in this investigation and the power of the Commission to require intrastate fares to conform to interstate fares in the four states is to be appraised in the light of a purpose to establish a national passenger rate structure. The Court apparently accepts as a premise the contention of the states that the present proceeding is an isolated investigation by the Commission into an application by the respective carriers in the four states to have their intrastate fares raised to the level of their interstate fares because the intrastate earnings were below a fair proportion of the carriers' total required income.[2] Instead we think that these

effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

[2] Compare the following excerpt from the opinion of the Court:

"But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intra-state passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intra-state traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina. It thought this action was justified by this Court's opinion in *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485."

proceedings are but another step in the comprehensive regulation by the Commission of the general passenger fare structure.

Basic Interstate Fares. The basic passenger fares were first investigated on a national scale by the Commission in *Passenger Fares and Surcharges*, No. 26550, decided February 28, 1936. In this proceeding carrier coach and pullman fares respectively were fixed at not to exceed 2 and 3 cents per passenger mile. 214 I. C. C. 174, 256.[3] The order, see paragraph 3, page 257, left these respondent roads in the southern territory free to continue certain experimental fares, which were as low as 1.5 cents per mile in coaches. A ten per cent increase, applicable to both the basic 2 and 3 cent fares and the experimental fares, was allowed on January 21, 1942, in a proceeding before the Commission, docketed as *Ex parte No. 148, Increased Railway Rates, Fares, and Charges*, 248 I. C. C. 545, 549, 564, 566, 612. A reference to the Commission's decisions in the above proceedings will indicate the full hearing which was given the fare problems in those cases. In the *Passenger Fares* case, the report of the Commission, 214 I. C. C. at 175, shows that all carriers by railroad subject to the act were made respondents and that a committee of the State Commissioners cooperated with the Commission in determining the issues. In the *Increased Railway Rates* case, all the states were notified of the pendency of the proceeding and a committee of the state commissions also attended the hearing and oral argument and conferred as to the determination of the issues. 248 I. C. C. at 549. All rail carriers were again before the Commission.

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[3] States made the earliest efforts to limit passenger fares. E. g. Kansas, 1901, § 66-167, Revised Statutes of Kansas (1923); North Dakota, 1907, § 4796, Compiled Laws of North Dakota (1913); Illinois, 1907, § 170, Callaghans Illinois Statutes Annotated (1924); Iowa, 1913, § 8126, Code of Iowa (1924). Such limitations were, of course, not uniform. On May 25, 1918, by General Order No. 28, the United States Railroad Administration in order to increase the operating revenue fixed the national basic passenger fare in coaches, interstate and intrastate, at not less than 3 cents per mile, with a surcharge for pullmans. This produced a considerable degree of uniformity. An increase of 20% or to 3.6 cents was made as of August 26, 1920. In the depression of the 1930s certain carriers operating in southern territory experimented with fair success on revenues with fares as low as 1.5 cents per mile in coaches. Alabama Intrastate Fares, 258 I. C. C. at 134.

Approximate uniformity before 1936 was maintained by the Commission's use of 13(4) orders to bring intrastate fares into line with interstate fares. The Commission found it more convenient later to secure state adoption of its rates by cooperation through agreement. See Sharfman, The Interstate Commerce Commission II, pp. 287-344.

After the ten per cent increase, the railroads of southern passenger association territory filed, on July 14, 1942, a petition in *Passenger Fares and Surcharges*, No. 26550, seeking a modification of paragraph 3 of the conclusions, 214 I. C. C. at 257, to enable them to file tariffs increasing their coach fare to 2.2 cents (2 cents plus 10 per cent). The Commission ruled that its former decision in No. 26550, 214 I. C. C. at 256, permitted all railroads, respondents therein, which included applicants, to charge a basic fare of 2 cents and that a general increase of 10 per cent on these rates had been authorized in *Ex parte No. 148*, and that therefore the Commission could and it did authorize the application of the 2.2 cent basic rate to interstate rates in southern territory. The Commission by order of August 1, 1942, directed that the petition in No. 26550 be denied, evidently because the order in that number had been superseded by the "Increased Rates" proceedings, *Ex parte No. 148*, and that its order in *Ex parte No. 148* be modified to effectuate this increase and that it be left otherwise unchanged.[4] The participating carriers then approached the separate state authorities to obtain their consent to the increase for intrastate passenger traffic in accordance with the recitation in the order of January 21, 1942, in *Ex parte No. 148*.[5] On the refusal of the rate regulatory authorities of North Carolina, Alabama, Tennessee and Kentucky to authorize the application of the increased interstate basic coach fare of 2.2 cents, with corresponding adjustments for pullmans, to all intrastate fares, this present proceeding was initiated by the carriers to secure the Commission order of May 8, 1944, here involved, which requires the application of a basis no lower than their present interstate basis to intrastate fares, notwithstanding the refusal of the state

[4] "*It is further ordered*, That the order of January 21, 1942, in Ex Parte No. 148 be, and it is hereby, further modified so as to authorize the aforesaid petitioners to apply the increase of 10 percent approved in said order to a basic coach fare of 2 cents per mile on the lines of said petitioners, subject to the rule for the disposition of fractions as modified by order of July 6, 1942, in said proceeding, and that in all other respects said order of January 21, 1942, shall remain in full force and effect."

[5] The portion of the order referred to reads as follows:

"*It appearing*, . . . that the proper authorities of all States have been notified of this proceeding, and similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;

. . . . . .

"*It is ordered*, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, . . ."

rate authorities to authorize a similar application. The commissions of the respective states, and the Price Administrator for himself and the Director of Economic Administration intervened.

The foregoing references make plain that beginning with the comprehensive investigation on passenger fares, which was instituted by Commission order of June 4, 1934, and resulted in the order of February 28, 1936, 214 I. C. C. 174, the state regulatory authorities have not only been advised of the rate proceedings but have participated in them. The record specifically shows this participation except in the supplementary proceeding under docket No. 26550, which was filed July 14, 1942, and resulted in the order of August 1, 1942, in docket *Ex parte No. 148*. This August 1, 1942, order, note 4 *supra*, permitted increasing the carriers' interstate fares of 1.65 cents per passenger mile (the 1.50 cents of the 1936 experimental southern district fares, then adjudged by the Commission to be "not unreasonable or otherwise unlawful," 214 I. C. C. 257, par. 3, and the ten per cent increase thereon of *Ex parte No. 148*, 248 I. C. C. 545, 564-66) to 2.2 cents. There was no occasion or requirement for hearing or report by the Commission or notice to the states of the petition of the southern passenger association carriers for permission to apply this 2.2 cents basic passenger rate to their interstate traffic.

The southern railroad passenger rate problem was stated in the terms of "what reasonable fare basis will meet with the greatest revenue response from the public?" 214 I. C. C. at 201. The conclusion of the Commission is thus summarized at page 255, finding of fact No. 11:

"Giving appropriate consideration to all of the evident circumstances and conditions which are likely to affect the ultimate revenue result to respondents, a maximum-fare basis, one way and round trip, for general application, of 2 cents per mile in coaches and 3 cents per mile in pullmans would be most likely to lessen the transportation burden of respondents and to harmonize with present-day economic conditions, with consequent fuller assurance to the respondents of realizing a fair return upon their property investment. There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein prescribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents."

This resulted in the following provision by the Commission, at page 257:

"3. The present experimental fares in the southern and western districts and on the Norfolk & Western are not unreasonable or otherwise unlawful."

Obviously this provision was to make clear that the current lower rates of the southern carriers were not disapproved. It cannot properly be read, even though entirely isolated from its context as a requirement that the southern carriers should continue to apply this lower basis to their passenger fares. The preceding provision limited the regular passenger fare structure of all railroads, including of course the southern carriers now appellees, to a maximum of 2 cents per passenger mile in coaches, without prejudice to lower fares. Lower fares were "discretionary" with the company. The accompanying order limited maximum interstate fares generally to 2 cents and contained no reference to the lower experimental fares. Thus a national interstate basis schedule, universally applicable[6] was established by the report and order in docket No. 26550, the *Passenger Fares and Surcharges* decision, and this basis was increased to 2.2 cents per mile by the January 21, 1942, order in *Ex parte No. 148*, 248 I. C. C. 545. Consequently when the southern carriers, appellees here, petitioned on July 14, 1942, seeking a modification to permit the publication of interstate passenger tariffs in conformity with the previous conclusions in No. 26550 and *Ex parte No. 148*, no further investigation, report or notice to anyone was needed.

The interstate basis had been fixed at 2.2 cents a few months before. Carriers and states alike had acquiesced. The carriers now wished to exercise the discretion to raise fares, which discretion had been reserved to them in No. 26550, 214 I. C. C. at 255, and subsequent conclusions 2 and 3, at 256. All that was necessary was to modify the order in *Ex parte No. 148* of January 21, 1942, which had approved, "as proposed", a requested ten per cent increase in fares "as published in passenger tariffs," 248 I. C. C. 550, 565, and the order, note 5 *supra*, so that the limitation "as published in passenger tariffs" would be removed. The appellee carriers had outstanding published tariffs of 1.50 cents when the January 21, 1942, order was entered. The August 1, 1942 order removed the limitation. See note 4 *supra*.

[6] There were certain specified exceptions. 214 I. C. C. at 244.

The preceding paragraphs under "Basic Interstate Fares" demonstrate, we think, that no further hearings or findings by the Commission were necessary to enable the Commission to authorize the application of the national basis of 2.2 cents to their interstate fares by the appellee carriers, instead of the 1.65 cents in effect prior to the order of August 1, 1942.

Discrimination Against Interstate Commerce. The Court holds, however, that even if it is assumed that the order permitting the interstate basic fare of 2.2 cents is valid, it does not follow that the intrastate passenger traffic earnings on the 1.65 cent rate are not contributing a fair proportion of the required total earnings of the road. The Court points to evidence from which the Commission might have found that the 1.65 cent basis, or a lower basis than 2.2 cents, would produce sufficient to meet the intrastate contribution. Evidence is set out in the Court's opinion showing greatly increased passenger earnings. The Court concludes that as such evidence is presented in this record, the Commission must make finding that no lower fare will produce intrastate traffic's proportion of revenue before requiring the application of the interstate 2.2 cent rate to intrastate fares.

This argument, we think, flows from another phase of the same misconception to which we earlier referred as the source of the Court's erroneous conclusion. These proceedings ought not to be treated as isolated efforts to secure higher intrastate rates because the present intrastate rates are not producing their fair share of the total required income. To the Court's requirement, which it reads into Sections 13(4) and 15a, of a specific finding on the issue of whether the present 1.65 cent intrastate rate produces now the proper intrastate proportion of revenue, there seems to us a conclusive answer. The interstate maximum was adopted by the Commission on the assumption that the intrastate rates would be adjusted to the same level. Therefore revenue from intrastate rates at the interstate fares is required to produce the needed income.

In this present proceeding the validity of the interstate rate of these carrier appellees was re-examined.[7] Evidence as to each

[7] The national investigation, Ex parte No. 148, has also been reopened and reexamined at late as December 12, 1944, but the passenger rates were left unchanged. 259 I. C. C. 159. This report discussed intermediate reexaminations of the national passenger rate structure.

appellee carrier of former deficits from its entire passenger traffic prior to 1942 was noted. Evidence as to their passenger operating ratios, their increased expenses, their net earnings on passenger business and other operations also, was received and appraised. Attention was called, 258 I. C. C. 142, to the fact that the previous investigation into passenger rates, *Ex parte No. 148*, had anticipated the earnings during war years, page 142, and their need for deferred maintenance and war service, page 148. The interstate basic rate was found just and reasonable. See *Alabama Intrastate Fares*, 258 I. C. C. 133, 137.

The figures used were aggregate figures for past passenger receipts and expenses. Audits for representative periods showed the estimated amount of additional revenue from the increased intrastate fares.[8] The statistics for the net railway operating income were introduced which covered all receipts and expenses. The evidence of train service in the respective states led the Commission to find that travel conditions were "substantially similar," 258 I. C. C. 154. If the Commission's conclusion as to carrier revenue needs assumed equal intrastate and interstate fares and if the present interstate rates were held "just and reasonable," it follows that the finding that the lower intrastate rates were not contributing their fair share of the "revenues required to enable respondents to render adequate and efficient transportation service" was proper. This logically led to the finding 6, that this failure of intrastate traffic to contribute its part discriminated against interstate commerce.

The determination of the necessary basic interstate rate in all these proceedings was made on the supposition of intrastate rates of equal level. When general basic rates, fares or charges are fixed by the Commission, the Commission necessarily gives consideration "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide" railway transportation at the lowest cost. Section 15a. Therefore when interstate rates are fixed with the supposition of an equal level for intrastate rates, for substantially similar service, it requires a

[8] Alabama Intrastate Fares, 258 I. C. C. 133, 154-55, Finding 5:

"Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service."

contribution on that basis from intrastate rates to avoid intrastate discrimination against interstate traffic. If it appears that interstate fares have been fixed with the supposition of an equal level for intrastate fares, then it is clear that intrastate rates are not producing their expected revenue. The Commission thus would have manifested its consideration of the statutory requirements of Section 13(4) and 15a that due consideration be given revenue and efficient management in finding unjust discrimination against interstate commerce and in prescribing the intrastate rate which would remove the discrimination. See *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.

In the proceeding in which these southern interstate carriers were permitted to apply the general basic interstate coach rate of 2.2 cents, the order therein of August 1, 1942, by adopting the order of January 21, 1942, in *Ex parte No. 148*, 248 I. C. C. 545, required the appellee carriers to make application to the state authorities for similar intrastate increases. See note 5, *supra*. The required applications led directly to this litigation.

Both in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 257, par. 5, and *Increased Railway Rates, Ex parte No. 148*, 248 I. C. C. 545, 565-66, which are the two investigations which brought interstate coach fares to a maximum of 2.2 cents per passenger mile, the Commission itself ordered the numerous intrastate fares which were under its direction because regulated by the Commission through previous Section 13 proceedings, modified in accordance with the interstate fares. As pointed out in the preceding paragraph the order in *Ex parte No. 148* required application to state rate regulatory bodies for authority to increase the intrastate passenger rates to the same level. Specific consideration was given to various objections raised by state commissions to the proposed new fares and rates, all with an eye to securing future compliance by the states with the interstate rates to be set by the Commission. See 248 I. C. C. at 560, 565, 574, 580, 582. In the *Passenger Fares* investigation, the figures of passenger traffic reflect the aggregate use of trains without consideration of a division of the traffic between inter- and intrastate. 214 I. C. C. 174, 176, 179, 180, 185, 200, 209, 221, 230, 231. The Commission said at page 187:

"At the time the 1920 increase was authorized many of the States prohibited passenger fares above certain amounts per mile, most

of them 2 cents or 2.5 cents, and section 13 orders by us became necessary in order to bring the intrastate fares in those States up to the interstate basis."

The tables of passenger statistics in the appendices do not separate the traffic. Revenue from all passenger traffic was the dominant motive. See "Fact Findings," page 253. Evidence in *Ex parte No. 148* likewise related to aggregate revenue. So did the expected increases.

"On the basis of traffic, both interstate and intrastate, moved during 1941 and moving when the petition was filed, allowing for readjustments required by commercial and traffic conditions, petitioners estimate that the proposals will yield increased revenue for all class I railroads of about $356,956,000 per year." 248 I. C. C. 552.

The interstate increase of *Ex parte No. 148* "became effective on intrastate traffic in all of the States" by state order. 258 I. C. C. at 136. The general considerations on the decline in railroad passenger traffic which motivated the Commission in establishing the new interstate rate applied to both intrastate and interstate traffic. 214 I. C. C. at 176; 248 I. C. C. at 551. As a matter of fact, separation of interstate and intrastate income is not required by the Commission in its annual reports. 49 C. F. R. § 120.11. *et seq.* These proceedings convince us that the Commission reached its conclusion as to the proper interstate rate with the understanding that the interstate rate would be applied to intrastate traffic and that such revenue as might result from that application were needed by the carriers involved to furnish adequate service.

Under Section 13(4) of the Interstate Commerce Act in proceedings as to unjust discrimination against interstate commerce, the issue is not the earnings from intrastate traffic but the appropriate proportion of those earnings as compared with earnings from interstate commerce. Section 15a requires consideration of costs, economy and adequate transportation service. Section 13(4) requires a finding of discrimination against interstate commerce as a basis for regulation of intrastate commerce, 258 I. C. C. 154-55, pars. 5 and 6. It may be that the earnings from intrastate commerce may sometimes be one percentage of aggregate earnings and at another time another percentage. The Commission may conclude that the carriers' required revenue may best be obtained from intrastate passenger fares rather

than from freight rates. The reverse was once true. Cf. 214 I. C. C. at 227. These are matters for Commission decision.

The language of 15a has been modified from its original form in the Transportation Act of 1920 so that it no longer specifically empowers the Commission to deal with fares and rates of carriers as a whole for the nation or as a whole in designated territories or rate groups. We think, however, that the present statute, "In the exercise of its power to prescribe just and reasonable rates," the Commission shall give consideration to various named factors, is adequate to permit general rate regulation under 15a and Section 1(5). This power has been unquestioned. See *Passenger Fares and Surcharges*, 214 I. C. C. 174, and Class Rate Investigation No. 28300 and Consolidated Freight Classification No. 28310. It is the only practicable approach to the problem. See discussion in *New England Divisions Case*, 261 U. S. 184, 196. We cannot treat the present proceeding as disassociated from the general investigation into passenger fares. *United States* v. *Louisiana*, 290 U. S. 70, 76-79. We think it is adequately shown that the orders in the general investigation were predicated upon the assumption that intrastate passenger traffic would have an equal basis with interstate traffic for fares.

Unjust or Unreasonable Intrastate Fares. It may be that the intrastate fares prescribed by the Commission are unjust or unreasonable in certain items. The report of the Commission provides a remedy for such a situation:

"The foregoing findings are without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act." 258 I. C. C. at p. 155.

The remedy for a readjustment of the basic interstate fare or for a separation of the levels of interstate and intrastate fares is by application to the Commission for reopening of *Passenger Fares and Surcharges*, 214 I. C. C. 174.

We do not consider the other points which are raised by the appeal.

The CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice FRANKFURTER join in this dissent.